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APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 143

JAMES PALMER,

Appellant,

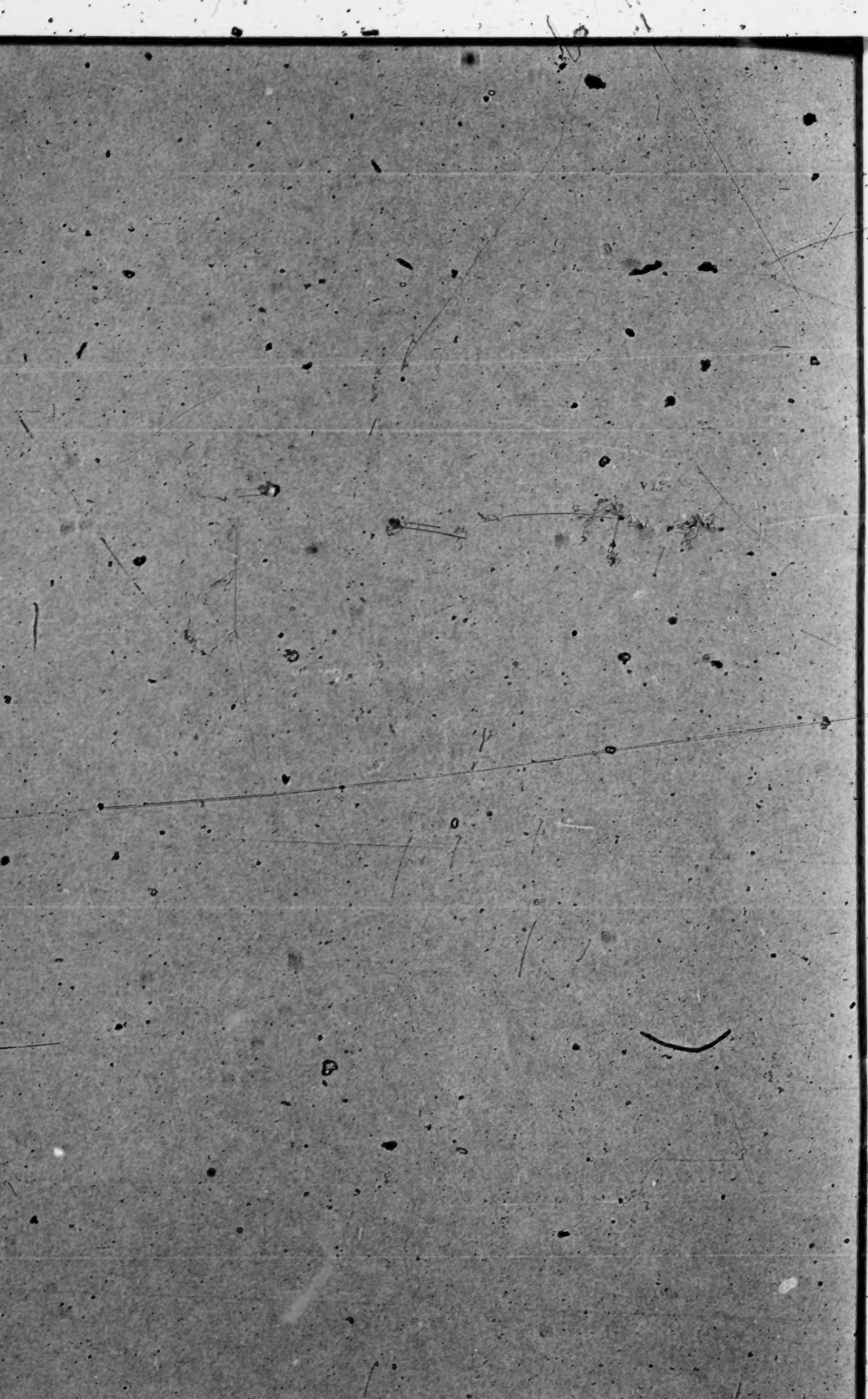
vs.

CITY OF EUCLID, OHIO,

Appellee.

APPEAL FROM THE SUPREME COURT OF OHIO

FILED APRIL 23, 1970
PROBABLE JURISDICTION NOTED MAY 4, 1970



IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1516

JAMES PALMER,

Appellant,

—v.—

CITY OF EUCLID, OHIO,

Appellee.

APPEAL FROM THE SUPREME COURT OF OHIO

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

April 19, 1967—Defendant Palmer charged, by affidavit filed in the Euclid Municipal Court, with acting in a suspicious manner in violation of Ordinance No. 583.01.

April 26, 1967—Defendant pleads Not Guilty.

August 21, 1967—Parties in Court. Trial had.

August 21, 1967—Jury finds defendant guilty as charged.

August 21, 1967—Court orders defendant to pay a fine of $50.00 and costs and to serve sentence of 30 days in the Cuyahoga County jail. Execution stayed pending appeal.

September 7, 1967—Motion to permit filing of motion for new trial granted.

September 13, 1967—Motion for judgment for defendant notwithstanding the verdict and motion for new trial overruled.

September 22, 1967—Notice of appeal on questions of law filed by defendant.

August 13, 1968—Judgment of Cuyahoga County Court of Appeals affirming the judgment of conviction.

September 11, 1968—Notice of appeal to the Supreme Court of Ohio filed by defendant.

December 18, 1968—Order of Supreme Court of Ohio dismissing appeal sua sponte for the reason that no substantial constitutional question exists.

December 18, 1968—Order of Supreme Court of Ohio denying motion to certify record.

January 2, 1969—Motion for rehearing filed.

January 22, 1969—Rehearing denied.

April 9, 1969—Notice of appeal to United States Supreme Court filed.

IN THE MUNICIPAL COURT
OF EUCLID, OHIO

Case No. 72818

CITY OF EUCLID, PLAINTIFF

v.

JAMES PALMER, DEFENDANT

AFFIDAVIT
Filed April 19, 1967

Case No. 72818

STATE OF OHIO
CUYAHOGA COUNTY
CITY OF EUCLID

MUNICIPAL COURT
EUCLID, OHIO
AFFIDAVIT

The Undersigned, Being First Duly Sworn, Deposes and Says:

On the 19 day of Apr., 1967 at 2:35 A.M.,
(Name) James Palmer
? ☐ Married ☐ Single (Please Print)
Tel. No. .....
(Street) 14632 Coit Rd. (?)
(City-State) Cleveland, Ohio
Employer ..... ? ..... Occ. ..... ? .....
(Driver's Lic. No.) ..... did unlawfully operate motor vehicle (Lic. No.) EG-7880 Make Chevrolet upon a public highway in the City of Euclid, County of Cuyahoga and State of Ohio, namely at (Location) 19219 Euclid Ave. and did there and then commit the following offense:

SUSPICIOUS PERSON

Speeding at rate of ..... m.p.h. in a ..... m.p.h. zone greater than reasonable or proper under existing conditions.

Disregard traffic signal:

Slow Sign ☐ Stop Sign ☐ Red Light ☐ Radar ☐ Sign Posted

Other violations and arresting officer's Remarks

Acting in a suspicious manner at above location. Additional information—see sup. report.

In Violation of
City Ordinance No. 583.01 Ohio Gen. Code Sect. No. _____

CONDITIONS

✔ Clear	☐ Dawn	☐ Light traffic	☐ Accident involved
☐ Rain	☐ Dusk	☐ Medium traffic	☐ School zone
☐ Snow	☐ Day	☐ Heavy traffic	✔ Residential
☒ Ice	✔ Night	☐ Personal injury	☐ Business
☐ Fog		☐ Property damage	☐ Freeway
		☐ Almost caused accident	☐ Had been drinking

INFORMATION

Birth date 5-17-32
Sex M-Colored
Height 6'1" Weight 180
Am't of Bond
$_____

Sworn to and acknowledged before me this 19 day of April, 1967.

/s/ [Illegible]
Deputy Clerk
Municipal Court

LT. ZACH
/s/ Joseph Zupanic #51
Signature and identification of officer or other complainant

FABEC #28

Court Appearance 26 day of Apr. 1967, at 9:30 a.m.,
Municipal Court—545 East 222nd St., Euclid, Ohio

For Waiver Privilege See Reverse Side of This Summons

Affidavit—Phone J. Palmer, 851-6616

DEFENDANT'S BILL OF EXCEPTIONS
Filed September 8, 1967

[fol. 3] Transcript of proceedings had in Municipal Court, Euclid, Ohio, commencing at 9:00 a.m., Monday, August 21st, 1967, before HONORABLE WILLIAM BURNS, and a jury of six.

APPEARANCES:

On behalf of the City of Euclid:

ROBERT STEEL, Police Prosecutor

On behalf of the Defendant:

JAMES PALMER

* * * *

[fol. 15] PLAINTIFF'S CASE

JOSEPH ZUPANIC,

of lawful age, a witness called on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Steel:

Q Will you please state your name?
A Patrolman Joseph Zupanic.
Q And you are a member of the City of Euclid's Police Department?
A That is correct.
Q How long have you been a member of the Police Department?
A Approximately 12 and a half years.
Q Besides your duties as a patrolman on the Euclid Police Department do you have any additional employment on your off-duty hours?
A Yes, I am employed part-time by Hill Top Management Company, Indian Hills Colony Apartments.

Q What are your duties in the employment of Hill Top Management, Indian Hills Colony Apartments?

A Mainly patrolling the area on foot and also in my own car, checking the buildings and so forth.

[fol. 16] Q Indian Hills Colony Apartments are located where?

A Approximately East 193rd and Euclid Avenue.

Q That's in what city?

A City of Euclid.

Q Calling your attention to the 19th day of April, 1967, in the early morning hours of that day, what were you doing from midnight until, let's say, 3:00 o'clock that day?

A From midnight until about 2:00 o'clock or so I was patrolling on foot throughout the whole area, which goes down to the end of East 193rd Street and from about 2:00 o'clock or so, after I was in my vehicle checking the parking lots.

Q All right, and about 2:30 a.m., on that particular morning did anything unusual occur?

A Yes. I observe this vehicle travelling east in the driveway of the parking lot, fronting on Euclid Avenue approximately between C and B buildings. I was travelling west in the driveway and noticed this vehicle travelling at a very slow rate of speed, approximately about a rate of 3 to 5 miles an hour.

Q Anything unusual about the vehicle?

A No headlights. It had no headlight on it at all, that's what aroused my suspicion to the vehicle.

[fol. 17] Q What, if anything, did you further observe?

A I observed the driver, that's the Defendant, Mr. Palmer, here, and he had a female companion, colored female on the passenger side of the vehicle. He dropped the passenger off at the front door of B building which is located right on the corner of 193rd and Euclid Avenue, and I turned my car around in the next driveway to follow him and see what was going on. As I approached East 193rd he was stopped just before entering East 193rd when I pulled behind him. He turned his lights on and he pulled on to East 193rd Street and

parked next to the curb. So I pulled my vehicle to the opposite of the street and got out of the car and approached him. As I approached his vehicle he had a microphone in his hand, talking on a two-way radio. I asked him who he was talking to on the radio, and he said he was just testing it. So I then asked him for identification and to get out of the vehicle. It was very dark in this area, I couldn't see too much of what was going on underneath there. I had him get out of the vehicle and show me his driver's license, and I asked him who the person was that he dropped out of the vehicle in front of the building. He said that it was just a friend, and I said, "Where did your friend go?" He said he didn't know, so I took him inside of the building, to the [fol. 18] lobby of the building and watched him while I called the police department, and asked for some assistance so we could make a search of the building to see where this female went to. Lieutenant Zach arrived with Patrolman Fabec and several other patrolmen. We made a search of the building and we stationed one policeman in the lower lobby to watch in case there—there are stairways in this building, it is six stories high, and an elevator in there too. We went on the elevator to check it out, and the locker rooms, we have had breakins into the locker area. We could not find the female anywhere. We returned back to the lobby and asked Mr. Palmer again, where his friend had gone. He finally admitted that she went into a suite up there, he took us up on the elevator to the fifth floor and took us directly to the doorway of a particular suite. This suite is occupied by two bachelors in this particular building and the party came to the door when we knocked on it. We asked if a colored female had come in here, and they said no, so we left the area, went back to the lobby and we had Mr. Palmer's car towed. It was brought to the station to be held for investigation.

Q Did Mr. Palmer—did you ask Mr. Palmer where he lived?

A Yes.

[fol. 19] Q What did Mr. Palmer tell you?

A In the station I asked him what his address was, he gave me one address and then changed his mind and gave me another address, and changed his mind and gave me a third address. He gave me three different addresses, so I really don't know whether it was the correct address he gave me or not.

Q Did you ask Mr. Palmer what he was doing there in the particular vicinity of Building B, of the Indian Hills Colony Apartments, there on East 193rd Street at 2:35 in the morning, on the 19th day of April?

A I asked him, he told me he just dropped his friend off, that's all he would tell me. He couldn't give me the name of his friend when I asked him what the female's name was, he said he didn't know.

Q Do you know where the friend of his lives?

A No, he didn't give me any name or address.

Q Patrolman, do you know whether or not there was any colored females living at the Colony Hills Apartments on the 19th of April?

A No, there are not, none whatsoever.

MR. STEEL: I have no further questions.

THE COURT: You may inquire of the officer on cross examination.

[fol. 20] CROSS EXAMINATION

By Mr. Palmer:

* * * *

[fol. 26] Q Somebody was around there? When you approached my car and asked for my driver's license you said—repeat again what you said happened when you approached my car and asked me for my driving license?

A Just asked you for your driver's license and told you to step out of the vehicle.

[fol. 27] Q And then once outside of the vehicle did anything happen?

A Yes, I searched you for a weapon, up against the car.

Q You searched me and what else?

A I had you up against the car and searched you for a weapon on your person?

Q And then what did we do?

A We went into the lobby of the building.

Q Was at any time, I am speaking of the time that I was sitting in the car and I got out of the car, and you searched me, that you had your gun out of its holster?

A No, I unflapped the flap on it but I didn't have it out, yes, sir.

Q You are saying that your gun was not out of your holster?

A No.

Q Pointed at me?

A Not this time.

Q Not at this time, well was it at a later time?

A Yes, sir, there was.

Q When was this?

A When I marched you into the building.

* * * *

[fol. 32] Q Did the fact that this woman entered the Indian Hills Colony Apartments, 192nd and Euclid Avenue have anything to do with your arresting me, with you arresting me?

A. Well, I would say it might have had some bearing on it in a way.

Q Then it either did or didn't. Yes, it did or no, it didn't.

A The fact that you couldn't give an accounting of your presence—

MR. PALMER: Your Honor, the witness is not responsive.

THE COURT: Just answer the question, officer.

MR. PALMER: Repeat the question.

(Reporter read question.)

A Yes, I would say it had some bearing.

[fol. 33] Q Did the fact that I would not give you any information concerning this woman have anything to do with you arresting me?

A Yes, I would say that had some bearing also.

Q Did the fact that I wouldn't give you any information concerning this woman cause you to look for her?
A Yes, that is correct.
Q Did you ask me the following: Who she was?
A Yes, sir, I did.
Q Where did she go?
A Yes, I did.
Q What she was doing there?
A That is correct.
Q Did you observe this woman breaking any laws?
A No, I didn't.
Q Well then, wasn't it just out of curiosity or suspicion in your mind that you wanted to know who she was?
A That is correct.
Q Was it just out of curiosity or suspicion in your mind that you wanted to know what she was doing in the building?
A That is correct.
Q Was it just out of curiosity and suspicion in your [fol. 34] mind that you wanted to know where she went?
A That is correct.
Q And was it just out of—this might—I might be repeating this question—was just on suspicion in your mind that you searched for this woman?
A Yes, we did.
Q Did you see this woman break any laws?
A No, I didn't see her break any laws.
Q But you searched for her anyway?
A That is correct.
Q You say you searched the locker rooms, the locker rooms for this woman?
A Locker rooms and hallways.
Q Locker rooms and hallways?
A That is right.
Q What concern was it of yours as to where she went?
A As to where she went, is that—
Q Yes.
A It's my job, there.
Q As to where she went?

A As a policeman.

Q As a policeman?

A Yes.

Q Does the leasing agent of this building have an [fol. 35] agreement with the tenants that they or whoever visits them, that is sign in or something?

A No.

Q Did you observe anything strange that would make you think this woman was doing anything?

A The fact that your headlights were off, for one.

Q Was she driving the car?

A No, she was a passenger in it.

Q Were any laws broken because the headlights on the car were off?

A Not at the time on private property. No laws were broken.

* * * *

[fol. 41] Q From the time that you observed the car with its lights off, until the time that the car stopped at the edge of the driveway, did you observe any laws being broken?

A Not at the time, yet, no.

Q Not at the time, did you say?

A No. Not until you parked.

Q I didn't hear you.

A Not until you parked the car at the curb.

Q Well, what did you observe being broken when I [fol. 42] parked at the curb?

A There is a no-parking sign there.

Q Did I stop my car or park my car?

A You stopped.

Q Did I park my car?

A You didn't get out of the car, you parked it.

Q Then it would be termed by the City of Euclid—did I park my car by the curb?

A I am not sure, there was a sign that says no stopping or parking. I will not positively—

Q Then if your're not sure, let me ask you again. From the time that you observed the car with the lights off until the time it stopped at the edge of the driveway, did you observe any laws being broken?

A Well, let's say I didn't observe any traffic laws being broken.

Q Did you observe any laws being broken?

A No.

Q When the car moved on to 193 Street, did you observe any laws being broken?

A No.

* * * *

[fol. 43] Q Did I tell you that I had stopped the car and was talking to the young lady and upon moving off again I forgot to turn my lights on, if they were off at all?

A I don't recall if you said that or not.

Q Can you tell me how many other cars you seen driving in Indian Hills Colony Apartments, with their lights off?

A Very seldom.

Q And if you saw a car driving with its lights off would that note a suspicion in your mind?

A In some cases.

Q In some cases?

A Yes.

Q Other than the fact that the car had its lights off, was it being driven in a normal manner?

A No, I would say not in a normal manner, it was being driven very slowly.

Q Was it going slower than you were?

A I couldn't say for sure, usually travels pretty slow.

Q But how fast was the car being driven?

A My car or your car?

Q My car.

A I would say three to five miles an hour.

Q On the night in question, how many cars would [fol. 44] one find on the premises of Indian Hills Colony Apartments?

A Would you repeat the question?

Q On the night that you arrested me, how many cars would one find on the premises of this apartment complex?

A I still don't get the first part of your question.

Q On April 19th, 1967, how many cars would one find on the premises of Indian Hills Colony Apartments, how many cars would be parked there on the night at 2:35 in the morning?

A Parked in the parking lot, I would say there was—

Q On the premises.

A Maybe 2,000 in the whole area.

* * * *

[fol. 59] Q Then you don't know whether I owned the car or not, do you?

A No, I don't.

Q Isn't it a normal—withdraw that. It is a policy of yours when you stop someone for suspicion you verify the ownership of the car that they were driving?

A Not all of the time, no.

Q So then the car could have been a stolen car?

A No, we know it was not a stolen car.

Q How do you know that?

A We checked the sheet, the car sheet.

Q In other words for a car to have been stolen the car would have been on the sheet that you checked, am I right?

A Not exactly.

Q Well, do you know whether the car was stolen or not?

A As far as we were concerned, from the record of the stolen car sheet and the teletype, it was not stolen.

Q As far as you were concerned. How large is this interrogation room where the interrogation took place?

MR. STEEL: Your Honor, I appreciate the fact that Mr. Palmer is not a lawyer, and for this reason throughout the morning and the last 15 minutes or so I have refrained from objecting to what I feel is perhaps a rather broad range of cross examination.

* * * *

[fol. 61] Q Inside of the building while we were wait-
[fol. 62] ing for the police officers to come, did you ask me any questions?

A Yes, I asked you—

Q Did you advise me of my constitutional rights rights before you asked me those questions?

A Not at that time, I didn't, no.

Q Was this lady a suspicious person, the one that got out of the car?

A No, not in my statement she wasn't.

Q But you and the lieutenant were looking for—withdraw that. But you were looking through the locker for this woman?

A Yes.

Q And the hallways?

A That is correct.

Q Did you check the lockers and see if they had been broken into?

A Yes, we did.

Q Did you check the locks on the lockers also?

A Yes.

Q Did you find anything broken into?

A No.

* * * *

[fol. 63] Q As far as you were concerned did this lady enter the building in a normal manner?

A Yes, she entered in a normal manner.

Q As you passed by the building did you see the lady inside of the building?

A No, I didn't.

Q Did you see her on the outside as you drove past?

A No, she was gone already from the lobby when I approached, when I made my turn and came back, she disappeared.

Q Are you sure that she entered the front door of the building?

A Yes, I observed that from my rear window.

Q As you passed the building did you observe anything that gave you the impression that the young lady had forced her way into the building?

A No.

Q And we can assume, can we, that the fact that you say she was colored and that no colored lives in that build-[fol. 64] ing, that you did not believe she lived there?

A I know she doesn't live there.

Q You know that she doesn't live there?

A Yes.
Q Do you also know that she was invited there?
A No, I didn't know.

* * * *

[fol. 66] Q Did you, either one of these other officers have any thought as to what had happened to this woman when you were unable to find her?
A Well, they just looked for her, made the search and she couldn't be found, we left and took you in.
Q Did we all leave the building together?
A No, you left with the other uniformed men and I brought my own car in.
Q How long did I leave before you left?
A Maybe five or 10 minutes, approximately.
Q When you started to go up to the elevator with the [fol. 67] lieutenant did you tell the officers down stairs, "Hold a colored woman if she comes down"?
A That is right.
Q Did you describe this woman to the officers?
A No, all I know she was a colored female.
Q Then what you meant was hold any colored woman who happened to come down?
A Yes.
Q Now, regards to whether she was any woman or not, hold a colored woman if she comes down, am I right?
A Yes.
Q When you saw as I parked on 193rd Street, the radio in the car, am I correct in saying that you saw me with the microphone in my hand?
A That is correct.
Q Did you hear me talking?
A I heard you talking, but you couldn't make out your message, what you said.
Q I told you that I was testing the radio?
A That's what you told me, yes.
Q Was the radio in the car a suspicious item?
A Yes, in my estimation, it was.
Q It was suspicious, just in your estimation?
A Yes.
[fol. 68] Q You felt you had a right to inquire concerning this radio?

A That is correct.

Q You know of any law in the City of Euclid prohibiting the use of mobile citizen ban receivers?

A No.

Q Do you know of any law in the State?

A Not that I know of.

Q Do you know of any law in the United States?

A I don't know of any.

Q Are you familiar with any—are you familiar with Part 95 of the Federal Communications Act?

A No, I couldn't tell you what it was.

Q Are you aware that citizen-band radios are covered under the federal statutes?

A Yes, I believe they are.

Q At the time you inquired concerning this radio were you aware that citizen-band transceivers were covered by federal statutes?

A Yes.

Q Were you aware upon search of the car that radio displayed all necessary requirements of the FCC for its operation?

A I didn't search the car.

[fol. 69] Q Well, as you looked into the car at the radio, did you notive that—withdraw that. Upon seeing the radio did you ask for its identification?

A No, I didn't.

Q Well, really other than the fact that the radio was suspicious you know nothing about citizen-band radio, am I correct?

A I am not expert on it.

Q Other than the fact that this was a suspicion concerning this radio, you know nothing about a citizen-band radio?

A No, nothing other than my suspicion.

Q Are you in the habit of passing judgment on something you know nothing about?

MR. STEEL: I object.

THE COURT: Sustained.

By Mr. Palmer:

Q Are you familiar with Section or Chapter 583 ordinance in the City of Euclid?

A Yes, I am.
Q Do you know the provisions under this chapter?
A Most of them, yes.
Q And they are—
A I have to see the ordinance to read them all, I don't know them all by memory.
[fol. 70] Q Well, the suspicious persons provisions of the chapter states that several specific reasons where a person would be deemed as suspicious in the eyes of the law and subsequently could be arrested. Do you know of these reasons?
A I know some of them, yes.
Q And what are they?
A I have to see the record to read all of them to you, I don't know from memory. Like I told you I know the broad form of the ordinance.
Q Well, will you please tell the Court which one of these reasons pertain to me at the time of my arrest?
A Yes. The terms that I was working on in this particular ordinance was acting in a suspicious manner during the night season, loitering in an area without being able to give an account or reasonable account of yourself, what you were doing there. That is the broad form of it.
Q Did I tell you that I had brought a young lady there?
A Yes, you did.
Q Did you see the young lady that I brought there?
A Yes, I did.
Q Well up until the time you approached my car on East 193rd Street what was I doing at the building?
A You were travelling with your lights off at a very slow rate of speed, in fact you were using a two-way [fol. 71] radio at 2:35 a.m. in the morning, these were my reasons.
Q Up until the time I parked on East 193rd Street what did you see me doing at the building?
A You didn't do anythi- at the building.
Q Did you see me drive a young lady up to the front door of 19219 Apartment B, I mean building B, Indian Hills Colony Apartments?
A Yes, I did.

Q You saw the young lady get out of my car and head for the building?

A Yes, I did.

Q And I think you stated that she went in the building, am I correct?

A That is correct.

Q So then, did I tell you that I had brought a young lady to the building?

A That you dropped a friend off, you told me.

Q Well, I told you, did I tell you that I had—I told you I had dropped the friend off at the building?

A Yes.

Q The fact was because I wouldn't give you any information concerning the lady you arrested me?

A That's one of the reasons.

Q Was there a speed limit in the parking lot?

[fol. 72] A There is no set speed limit there.

Q Handing you what has been marked Defendant's Exhibit E, do you notice anything in that picture? Is that a picture of Indian Hills Apartments, to the best of your knowledge?

A Yes.

Q Do you know anything of that picture that would lead one to believe that there is a speed limit on the premises of the Indian Hills Colony Apartments?

A Yes, that's privately posted sign.

Q What does it say?

A Speed limit 15.

Q Was the fact that the young lady entered the building one of the reasons why you stopped me?

A It was one of the reasons, yes.

MR. PALMER: May I approach the bench?

THE COURT: Yes, sir.

(The prosecutor and the Defendant approached the bench. Discussion was had out of hearing of the jury.)

By Mr. Palmer:

Q When you first saw the car driving towards you in the parking lot at Indian Hills Colony Apartments, did you have any report of any crime having been committed?

[fol. 73] A No.

Q Had you received any personal instructions for investigation of any particular crime that night?

A No.

Q From the police department did you receive any special instructions?

A No.

Q From your office at the building did you receive any instructions?

A No.

Q Were you informed by radio, telephone or any other means of communication of a crime on that night?

A No.

Q So then, you weren't, you were not specifically investigating any particular item other than occupants driving with its lights off at Indian Hills Colony Apartments, am I correct?

A At that particular time, yes.

Q When you searched me what did you find?

A Nothing.

Q Were you looking for anything in particular?

A Weapon.

Q For the entire time you observed the car and its occupants was there any noise or disorder of any kind?

[fol. 74] A No.

* * * *

Q I have just three or four more questions. Did you not know of any crimes that the woman had committed?

A No.

Q Why were you looking for her?

A Mainly looking for her in the prevention of crime at this particular instance.

Q Did you have any report of any crime that was being committed?

A No.

* * * *

[fol. 77] REDIRECT EXAMINATION

By Mr. Steel:

Q Patrolman, you have other duties in connection with your private employment by Hill Top Management

of the Indian Hills Apartment, than crime protection, do you not?

A Yes.

Q What are these other duties, with Hill Top Management?

A I check the buildings for loud parties, people drinking, intoxicants, and so forth, and cautioning disturbances, parking problems, issuing citations in the fire lane.

Q Primarily prevention would be part of your duties, as well as a protection?

A Definitely, crime prevention, we have had many cars broken into in this area, automobiles stolen, lockers in the building broken into and other various types of crime.

[fol. 78] Q Now, during the course of your 12 years as an officer of the Euclid Police Department, are you familiar, Patrolman, in the manner in which two-way radios or walky-talkies or various communications devices of this nature are used by persons engaged in the commission of crime?

A Yes. Walky-talkies are used by the modern day criminal in holdups, burglaries, bank stickups and various types of crime. They could have a receiver, they also have a pocket receiver on which they may receive messages from a central location. There are several different types of walky-talkies and receivers on the market today that are used like I say by the modern day criminal.

Q After you discovered that Mr. Palmer had a two-way radio in his car, do you not know as a result of your investigation whether or not this woman that he discharged at the apartment had a receiver or not, do you?

A No, I don't.

Q Not to this day, do you?

A No.

Q Now, I believe the testimony indicates that Mr. Palmer told you that he had discharged a young lady at the entrance to the Apartment B; did he tell you whether or not that he was waiting for this young lady?

A No, he didn't say. He said it was a friend and he [fol. 79] wouldn't give me any information or the name of this party, just a friend.

Q In the course of you conversation with him since, did he tell you that he knew which apartment she was in, is that right?

A Later on, yes, he admitted to you and to us to the apartment.

Q Was she in this apartment to your knowledge?

A The man said she was not there.

Q Now, what was it, Patrolman, the fact that this automobile had no headlights on it the reason that raised your suspicion?

A No.

Q Was the fact that it was travelling between three and five miles an hour alone that raised your suspicion?

A No.

Q Was the fact that it discharged a colored lady at the door of an apartment where you knew that no colored ladies lived alone that raised your suspicion?

A No.

Q Was the fact that the driver of this automobile parked on the dark side of the street, 193rd Street alone that raised your suspicion?

A No.

[fol. 80] Q Was the fact that this man was using a two-way radio alone that raised your suspicion?

A No.

Q Was the combination of all of these facts that raised your suspicion?

A That is correct.

Q Did Mr. Palmer that night either on East 193rd Street, in the police station or at any time up to and including today give any satisfactory reason for his presence there on East 193rd Street and in the parking lot of the Indian Hills Apartment?

A No, he never did.

MR. STEELE: I have no further questions.

RECROSS EXAMINATION

By Mr. Palmer:

* * * *

[fol. 82] Q Was the fact alone that the young lady, that a colored woman entered Indian Hills Apartments one of the reasons that you arrested me?

A It was one of the reasons, yes.

Q Did entering the Indian Hills Apartments by the woman violate any laws?

A No.

Q Was the fact that alone, that I did not have my [fol. 83] lights on while driving in the parking lot one of the reasons that you arrested me?

A No.

Q Was any laws broken because I did not have my lights on?

A No.

Q Was the fact alone that you saw a C-B radio in the car one of the reasons that you arrested me?

A No.

Q Was this fact that you saw a C-B radio in the car in violation of any law?

A No.

Q Was the fact that I could have been talking to that radio one of the reasons that you arrested me?

A No.

Q Was the fact that I could have been talking on that radio in violation of any law?

A No.

Q Was anything done that night in violation of any law that you observed?

A Yes, the combination of facts.

Q Individually?

A No, collectively.

Q Individually there were no violations but a com- [fol. 84] bination of the facts made them violations of a city ordinance, am I correct?

A Collectively, yes.

* * * *

[fol. 85] AUGUST ZACH,

of lawful age, another witness called on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Steele:

Q Will you please state your full name?
A August Zach.
Q And by whom are you employed?
A City of Euclid, Police Department.
Q Are you a lieutenant in the Police Department, is that correct?
A I am.
Q How long have you been a member of the Police Department?
A 32 and a half years.
Q Lieutenant, you were on duty in the Euclid Police Department during the early morning hours of the 19th day of April, 1967?
A I was.
Q Did you have occasion, Lieutenant, to take a telephone summons from Patrolman Zupanic to go to the Indian Hills Colony Apartments, 19219 Euclid Avenue, in the City of Euclid during the early morning hours of that day?
[fol. 86] A I did.
Q When you arrived at these apartment buildings, did you have occasion to go into Building B?
A. I did.
Q Did you discover Patrolman Zupanic there in Building B?
A. I did.
Q Was anyone else with him?
A Yes, he had the gentleman here in the lobby.
Q Did you have occasion then to have any conversation with Mr. Palmer there in the lobby of Building B?
A Yes, I did.
Q Do you recall what this conversation was about?
A Well, I asked him what he was doing there and he said he was dropping off a friend. I asked him who the friend was, he didn't know, he said it was a female. And when I asked him where the woman went, he didn't know. After we questioned him a little while he said, "OK, I'll take you upstairs to the fifth floor where she is supposed to be." We went up to the fifth floor to this

apartment where he claimed she was, we rapped on the door and a male answered the door. I asked if there was a woman in there, he said no.

We searched the building and didn't find her.

[fol. 87] Q Did Mr. Palmer tell you anything that led you to believe that he was employed by the Hill Top Realty Company, Incorporated, or the Indian Hills Colony Apartments?

A No, he did not.

Q Did Mr. Palmer tell you anything that led you to believe that he had any friends who had invited him to the Indian Hills Colony Apartments?

A No, he didn't.

Q Did Mr. Palmer tell you anything that would lead you to believe that he had any lawful business there?

A No.

Q Other than the fact that Mr. Palmer told you that he had dropped off this friend who he would not identify, and whom he indicated had gone to an apartment, where you were told she was not, did he give any other account for why he was there in front of Indian Hills Colony Apartment, Building B. or on East 193rd Street at 2:30 in the morning, on the 19th day of April, 1967?

A Not to me, no.

* * * *

[fol. 106] RECROSS EXAMINATION

By Mr. Palmer:

* * * *

[fol. 107] Q When the Prosecutor asked you, on redirect?

Did you tell the Prosecutor that had you found the woman in an apartment there on legal business, you would not have permitted the arrest? Did you say that?

A That is right.

* * * *

[fol. 110] Q Would you have withdrawn the citation?

A Yes.

Q If it was proven that the woman had a lawful reason to be there?

A No.

Q Okay. And if you wouldn't have permitted the citation, then by being officer in charge, what would you have directed Officer Zupanic to do, as far as I was concerned?

A We would have brought you into the station and had you sign a waiver card that we detained you.

Q What is this waiver card? If I would refuse to sign the waiver card, then what would have happened to me?

A Well, then, we would have detained you, probably issued the citation, because you refused to sign the card.

Q You would have issued a citation for my arrest even though you found this lady lawfully at the building; is that what you're saying?

A That is right. If you refused to sign the card.

* * * *

[fol. 129] COURT'S CHARGE TO THE JURY

* * * *

THE COURT: Members of the Jury, it now becomes my duty as the Judge in this trial to instruct you about the law which is applicable in the case.

To begin with, and just to review a little what has transpired today, this Defendant was arraigned in open court, on April 26, 1967, on an affidavit charging him with the offense of being a suspicious person, within the City of Euclid, County of Cuyahoga, and State of Ohio.

This charge was brought under Section 583.01 of the codified ordinances of the City of Euclid, which reads as follows:

"A suspicious person"—there are a number of para-[fol. 130] graphs here, but, through the testimony which was presented and comments of both the Prosecutor and the Defendant, the Court would restrict your consideration of this ordinance to one paragraph. That paragraph is as follows:

Any person—in other words, it says—it shall be unlawful for any suspicious person to be within the municipality, and goes on to say the following should be sus-

picious persons, and there are a number of paragraphs. However, the one which I would ask you to restrict your decision to would be as follows:

Section E. "Any person who wanders about the streets or other public ways or who is found abroad at a late or unusual hour in the night without any visible or lawful business and who does not give satisfactory account of himself."

* * * * *

JUDGMENT
Filed August 21, 1967

8-21-67 Parties in court. Trial had. The jury having heard the testimony of the witnesses and parties, the arguments of prosecutor and defendant, and the charge of the court thereon returned the following verdict after due deliberation:

"We, the Jury in this case, being duly impaneled and sworn, do find the defendant guilty as charged in the affidavit"

(signed) Frank J. Aubel, Foreman, also signed by each of the jurors.

At the request of the defendant the jury was polled individually, and each concurred in the verdict. Thereupon, having been in open court when the jury returned its verdict, and being advised by the court of the jury's verdict defendant was then asked by the court if he had anything to say why judgment should not be pronounced against him, and having nothing but what he has already said, the court pronounced the following judgment:

It is therefore considered and adjudged by the court that defendant James Palmer, pay a fine of $50.00 and costs of this proceeding and that he be sentenced to Cuyahoga County jail for 30 days.

Defendant having given his oral notice at this time of his intention to appeal and upon his request, stay of execution is granted pending appeal. Same bond. $500.00 cash.

/s/ WM. F. BURNS
Judge

ORDER
Filed September 7, 1967

Motion to Permit filing of Motion for New Trial, granted.

/s/ BURNS
J.

ORDER
Filed September 13, 1967

Defendant in court with counsel R. W. Jones. Motion of defendant that Motion for New Trial also include Motion for judgment for defendant not withstanding the verdict granted.

Hearing had in Motions. Motion for Judgment for defendant not withstanding the verdict and Motion for New Trial overruled. Execution of sentence suspended pending filing of notice of appeal. Appeal bond $500.00

/s/ BURNS
J.

IN THE COURT OF APPEALS
OF CUYAHOGA COUNTY, OHIO

No. 28810

CITY OF EUCLID, PLAINTIFF-APPELLEE

vs.

JAMES PALMER, DEFENDANT-APPELLANT

JOURNAL ENTRY

Filed August 13, 1968

This cause came on for hearing upon the appeal on questions of law, assignments of error, bill of exceptions, the transcript and the original papers and pleadings from the Euclid Municipal Court of Cuyahoga County, and was argued by Counsel for the City of Euclid and by the defendant, on consideration whereof the Court finds there is no error apparent on the record in said proceedings and judgment prejudicial to the appellant.

It is, therefore, considered by the Court that the judgment of the Euclid Municipal Court be, and the same is hereby affirmed and that the costs be assessed against the appellant herein.

It is further ordered that a copy of this order of affirmance be certified to said Euclid Municipal Court as provided by law.

To all of which appellant excepts.

It is ordered that a special mandate issue out of this court directing the Euclid Municipal Court to carry this judgment into execution.

Approved:

/s/ JAMES PALMER
JAMES PALMER
For Defendant-Appellant

/s/ CHAS. W. WHITE
Presiding Judge

WILLIAM T. MONROE
Director of Law,
City of Euclid

By: /s/ ROBERT F. NICCUM
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IN THE SUPREME COURT OF OHIO

No. 68-571

CITY OF EUCLID, APPELLEE

vs.

JAMES PALMER, APPELLANT

APPEAL FROM THE COURT OF APPEALS FOR CUYAHOGA COUNTY

ORDER
Filed December 18, 1968

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Euclid Municipal Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR CUYAHOGA COUNTY TO CERTIFY ITS RECORD

ORDER
Filed December 18, 1968

It is ordered by the Court that this motion is overruled. Costs: Motion Fee, $20.00, paid by James Palmer

ORDER
Filed January 22, 1969

It is ordered by the court that rehearing in this case is denied.

SUPREME COURT OF THE UNITED STATES

No. 134 Misc., October Term, 1969

JAMES PALMER, APPELLANT

v.

CITY OF EUCLID, OHIO

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

May 4, 1970

SUPREME COURT OF THE UNITED STATES

No. 134 Misc., October Term, 1969

JAMES PALMER, APPELLANT

v.

CITY OF EUCLID, OHIO

APPEAL from the Supreme Court of the State of Ohio.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted. The case is transferred to the appellate docket as No. 1516 and placed on the summary calendar.

May 4, 1970

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SUPREME COURT, U. S.

FILED
SEP 2 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 143

JAMES PALMER,

Appellant,

v.

CITY OF EUCLID, OHIO,

Appellee.

APPEAL FROM THE SUPREME COURT OF OHIO

BRIEF FOR APPELLANT

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Washington, D. C. / THIEL PRESS / 202 / 393-0625

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 143

JAMES PALMER,

Appellant,

v.

CITY OF EUCLID, OHIO,

Appellee.

APPEAL FROM THE SUPREME COURT OF OHIO

BRIEF FOR APPELLANT

OPINIONS BELOW

No opinions were delivered by any of the courts below.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on December 18, 1968 (A. 30). A petition for rehearing was denied on January 22, 1969 (A. 30). The ap-

peal was filed in this Court on April 22, 1969, and probable jurisdiction was noted on May 4, 1970. The jurisdiction of this Court rests on 28 U.S.C. § 1257(2).

CONSTITUTIONAL PROVISIONS AND ORDINANCE INVOLVED

United States Constitution

Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Amendment V:

> * * * nor shall any person * * * be compelled in any criminal case to be a witness against himself * * *

Amendment XIV, Section 1, Clause 2:

> * * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ordinance of the City of Euclid, Ohio

Section 583.01

> It shall be unlawful for any suspicious person to be within the Municipality. The following shall be deemed suspicious persons:
>
> * * *

(e) Any person who wanders about the streets or other public ways or who is found abroad at late or unusual hours in the night without any visible or lawful business and who does not give satisfactory account of himself;

QUESTIONS PRESENTED

I.

Whether an ordinance providing for imprisonment of suspicious persons, defined as "Any person who wanders about the streets or other public ways or who is found abroad at late or unusual hours in the night without any visible or lawful business and who does not give satisfactory account of himself;" is so vague and lacking in ascertainable standards of guilt as to fail to give fair notice of what is prohibited, invite arbitrary and discriminatory enforcement, and sweep within its ambit constitutionally protected conduct, so as to be void as in conflict with the Fourteenth Amendment's guarantee of due process of law?

II.

Whether, consistent with the Fifth Amendment's privilege against self-incrimination, an ordinance may compel a suspect to "give a satisfactory account of himself" under pain of fine and/or imprisonment for failure or refusal to do so?

III.

Whether the Euclid suspicious persons ordinance unconstitutionally infringes freedom of movement by allowing arrest, detention, and conviction on suspicion in violation of the Fourth and Fourteenth Amendments?

STATEMENT

On August 21, 1967, James Palmer was convicted after a jury trial of being a suspicious person in violation of Section 583.01(e) of the Ordinances of the City of Euclid, Ohio (A. 26).

The evidentiary basis for the conviction was primarily the testimony of one Joseph Zupanic, a member of the City of Euclid Police Department (A. 4). Zupanic testified that in the early morning hours of April 19, 1967, while he was working his off-duty job patrolling the Indian Hills Colony Apartment complex (A. 5), his suspicion was aroused by Palmer's automobile travelling at a very slow rate of speed without headlights in the driveway of the parking lot (A. 5). Upon observation he became even more suspicious, because he saw a "colored female" alight from the passenger side of the car and enter the building (A. 5), and he claimed to know that no "colored females" lived at the apartments (A. 7, 21).*

Palmer then turned his headlights on, pulled his car onto the street and parked (A. 5-6). As the patrolman approached to investigate, he noticed that Palmer had a microphone in his hand and was talking on a two-way radio (A. 6). Zupanic testified that he asked Palmer for identification and asked him to get out of the vehicle, and that Palmer got out and showed him his driver's license (A. 6). Zupanic put Palmer up against the car and searched him for weapons (A. 7).

In response to a question about the identity of the female, Palmer indicated that she was just a friend and that he didn't know where she had gone (A. 6). Whereupon Zupanic marched Palmer into the building at gunpoint (A.

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*The Indian Hills Colony Apartments were of such magnitude that Patrolman Zupanic estimated that maybe 2,000 cars would be parked there at night (A. 12).

8) and called the police department for assistance (A. 6). A thorough search of the premises failed to find the female (A. 6).

Palmer subsequently agreed to take the police officer to the apartment where he thought the female had gone, but when the party within denied that any colored female had come into the apartment, Palmer was taken to the police station and his car was towed there for investigation (A. 6).

Zupanic testified that during the course of interrogation at the station, appellant gave him three different home addresses, said he didn't know the female's name (A. 7), and gave no satisfactory explanation of his presence at the apartments (A. 20) beyond that of dropping his friend off (A. 7).

A lengthy and meandering cross-examination of Zupanic by Palmer* disclosed that all of his observation (A. 9-11), his search of Palmer (A. 7), his search of the apartment building (A. 13), his check of the stolen car sheet (A. 12), and his interrogation of Palmer at the police station (Tr. 53-58) produced not a scintilla of evidence of any substantive offense committed by either Palmer or the "colored female" (A. 21). Further, there was no report of any crime having been committed (A. 18).

James Palmer did not testify in his own defense; the court charged the jury in the language of the ordinance without further explanation or limitation (A. 24-25); and the jury found Palmer guilty of being a suspicious person (A. 26). The court sentenced him to serve 30 days in the Cuyahoga County Jail and to a fine of $50.00 and costs (A. 26).

Palmer's motion for a new trial based on the constitutional invalidity of the ordinance under which he had been

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*James Palmer, although not a lawyer, conducted his own defense (A. 12).

convicted was denied (A. 27). On appeal to the Court of Appeals of Cuyahoga County, Palmer's conviction was affirmed without opinion (A. 28). Palmer's appeal to the Ohio Supreme Court was dismissed on the ground that no substantial constitutional question existed (A. 30). After rehearing was denied (A. 30), Palmer appealed to this Court, which noted probable jurisdiction on May 4, 1970 (A. 31).

SUMMARY OF ARGUMENT

I.

A. *Ordinance fails to give fair notice by reason of its vagueness.* No ascertainable standard of conduct is provided by any of its elements. "Wanders" has been interpreted by diverse judges to include *only innocent conduct, only criminal conduct,* and *both innocent and culpable conduct.* "Found abroad at late or unusual hours of the night" is simply a nocturnal version of wandering and is subject to the same vagaries of interpretation. The phrase "without visible or lawful business" simply begs the question of when wandering itself is lawful business. "Does not give satisfactory account of himself" raises a host of questions as to what kind of satisfaction and whose satisfaction is required. The uncertainties in this phrase has led nine lower federal and state courts to strike down statutes containing it. Nor does the phrase "suspicious person" lend any finite content to this otherwise vague ordinance.

B. *Ordinance invites arbitrary and discriminatory enforcement by reason of its vagueness.* The requirement that suspects give a "satisfactory account" conditions their freedom of movement on the suffrance of any police officer. Thus, the ordinance cannot stand consistent with *Shuttlesworth v. City of Birmingham,* 382 U.S. 399 (1966).

The vagueness of its other elements facilitates the employment of constitutionally illegitimate bases for the selection of subjects from whom "satisfactory accounts" are de-

manded. A satisfactory account was demanded of James Palmer in part because "a colored female" alighted from his car, when the police officer knew that no colored females lived in the area (A. 5, 7, 20-21). National statistics and empirical studies of police behavior demonstrate that Negroes are disproportionately burdened by suspicious person arrests. But even if race be viewed as a neutral and rational basis for determining who is "out of place" it may not be so employed, because it is the product of, and contributes to, a long and tragic national history of housing discrimination and segregation. A virtually all-white City of Euclid would not otherwise exist in a county having a nonwhite population in excess of fifteen per cent.

The ordinance's capacity for arbitrary enforcement also includes the potential for suppressing non-criminal but unconventional persons and behavior, a substantial risk in light of recent empirical evidence that a commitment to conventionalism is a significant characteristic of the police personality.

The ordinance's vagueness further licenses judges and juries to convict for unconventional behavior in violation of *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966).

C. *Ordinance's vagueness as permitting application to constitutionally protected conduct.* The ordinance threatens the privilege against self-incrimination, freedom of movement, freedom from arrest except upon "probable cause", and freedom from conviction except upon proof beyond a reasonable doubt, as is developed in the remainder of the brief.

II.

The privilege against self-incrimination prohibits government from using compulsion to elicit incriminating admissions, *Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965), from penalizing the invocation of the privilege, *Spevack v. Klein*, 385 U.S. 511 (1967), and from

using in any criminal prosecution statements made under threat of sanction for refusal to answer. *Garrity v. New Jersey*, 385 U.S. 493 (1967). These principles establish beyond peradventure that the police have no right to compel answers to their incriminating questions. *Davis v. Mississippi*, 394 U.S. 721, 727 n. 6 (1969). Yet, the City of Euclid has enacted an ordinance that purports to give them that right.

The ordinance must be declared unconstitutional on its face because it violates the central meaning of the privilege against self-incrimination and the privilege cannot adequately be protected from it on a case by case basis because of the paucity of appellate review due to the ignoble socio-economic status of most defendants, the relatively minor penalties compared to the costs of appeal, mootness by service of sentence, and the absence of a written record.

As applied in this case the ordinance produced a conviction which cannot stand because it is predicated in part upon statements elicited from Palmer under compulsion to "give a satisfactory account". *Garrity v. New Jersey*, 385 U.S. 493 (1967).

III.

"Freedom of movement is basic in our scheme of values", *Kent v. Dulles*, 357 U.S. 116, 126 (1958), but it is not absolute. The delicate balance between liberty of movement and the requirements of order is drawn by the Constitution and reflected in an escalating scale of burdens of proof, emanating from the Fourth and Fourteenth Amendments, required of government before it may deprive persons of that freedom. A brief, on-the-street detention requires "articulable suspicion"; an arrest demands "probable cause"; and imprisonment pursuant to conviction requires "proof beyond a reasonable doubt". The Euclid suspicious persons ordinance makes hash out of this delicate constitutional balance by authorizing all levels of deprivation on mere suspicion.

The Euclid suspicious persons ordinance is not necessary to law enforcement because of this Court's decision in *Terry v. Ohio*, 392 U.S. 1 (1968) and the availability of feasible alternative means of dealing with suspicious circumstances and persons, such as the *Uniform Arrest Act*, the *New York "Stop and Frisk" Act*, the *Model Code of Pre-Arraignment Procedure*, and the common law powers recognized in *State v. Terry*, 5 Ohio App. 2d 122, 214 N.E. 2d 114 (1966), all of which are less stifling of fundamental personal liberties. The alternatives do not permit arrests or convictions on mere suspicion; do not make it a crime to exercise the privilege against self-incrimination, and do not shift the burden of proof to the defendant. This Court can make a significant contribution to constitutional liberty at no cost to law enforcement by striking down the Euclid suspicious persons ordinance.

ARGUMENT

I.

THE EUCLID SUSPICIOUS PERSONS ORDINANCE IS SO VAGUE AND LACKING IN ASCERTAINABLE STANDARDS OF GUILT THAT IT FAILS TO GIVE FAIR NOTICE OF WHAT IS PROHIBITED, INVITES ARBITRARY AND DISCRIMINATORY ENFORCEMENT AND SWEEPS WITHIN ITS AMBIT CONSTITUTIONALLY PROTECTED CONDUCT, SO AS TO VIOLATE THE GUARANTEE OF DUE PROCESS OF LAW.

This Court has long held that "the first essential of due process of law" is violated by "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926).

The requirement that criminal statutes be drawn with clarity and precision so as to provide an ascertainable stand-

ard of guilt is founded upon three separate, but related policies: to provide fair notice of what conduct is prohibited, so that those who wish to conform their conduct to law may do so, *Lanzetta v. New Jersey*, 306 U.S. 451 (1939); to prevent arbitrary and discriminatory enforcement of the law by reducing the scope of discretion of those administering it, *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966); *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965); and to limit the breadth of statutes affecting constitutionally protected freedoms in order to prevent their infringement by "sweeping and improper" statutory application. *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963); *Aptheker v. Secretary of State*, 378 U.S. 500, 516-517 (1964).[1]

The suspicious persons ordinance under which James Palmer was convicted and sentenced to thirty days imprisonment is patently vague and blatantly at odds with each of the constitutional policies which underlie the void-for-vagueness doctrine.

A. The Ordinance Is So Vague That It Fails To Give Fair Notice Of What Is Prohibited.

Many statutes have been invalidated by this Court for failing to provide fair notice on the basis of the vagueness of a single word or phrase.[2] The Euclid suspicious persons

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[1] This tripartite analysis of the void-for-vagueness doctrine was fully developed by Professor Amsterdam in *Note, The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960), and applied to vagrancy and suspicious person type laws in Amsterdam, *Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like*, 3 CRIM. L. BULL. 205 (1967).

[2] See, e.g., *Cline v. Frink Dairy Co.*, 274 U.S. 445 (1927) ("a reasonable profit"); *Connally v. General Constr. Co.*, 269 U.S. 385 (1926) ("current rate of . . . wages in the locality"); *United States v. L. Cohen Grocery Co.*, 255 U.S. 81 (1921) ("unjust or unreasonable rate").

ordinance is rendered incomprehensible as a guide for the governance of conduct, by the fact that virtually its every phrase is afflicted with the vice of vagueness. No ascertainable standard of conduct is provided by "wanders", "found abroad at late or unusual hours in the night", "without any visible or lawful business", "does not give satisfactory account of himself", or "suspicious persons".

(1) *"Wanders"*

Webster's Unabridged Dictionary (2d ed. 1962) defines "wander" as: "to ramble here and there, without any certain course[3] or object in view; to travel or move from place to place without any fixed purpose or destination . . ."

The ambiguities inherent in these lay definitions of "wander" are reflected by the many and conflicting interpretations accorded the word by judges who have had occasion to construe it. In *City of Columbus v. DeLong*, 173 Ohio St. 81, 180 N.E. 2d 158 (1962), a majority of the Ohio Supreme Court held that since "wander" is commonly defined as moving about "without a fixed course, aim or goal", the word necessarily excludes having a criminal purpose, and thus the ordinance in question was invalidated as prohibiting *only innocent conduct*. On the other hand, Judge Taft in dissent would have upheld the ordinance, contending that in the context of the ordinance "wander" encompassed *only criminal conduct*, requiring proof of intent to solicit for prostitution. A third distinct interpretation of "wander" was rendered in *City of Seattle v. Drew*, 70 Wash. 2d 405, 423 P.2d 522 (1967), in which the court construed the word to include *both innocent and culpable conduct*, and therefore struck down the ordinance in question as overly broad. The Seattle Ordinance was not saved by the presence of the equally imprecise, but more pejora-

[3]This much of the definition is identical to that contained in *Black's Law Dictionary* (4th ed. 1957).

tive, word "loiter". Similarly the United States Court of Appeals for the District of Columbia held that neither "wander" nor "loiter" was sufficiently precise to withstand constitutional scrutiny, citing conflicting judicial[4] and police interpretations[5] "ranging from the ostensibly innocent to the potentially criminal". *Ricks v. District of Columbia*, 414 F.2d 1097, 1103, 1107 (D.C. Cir. 1968).

A host of other lower federal and state courts have recently struck down vagrancy or suspicious persons laws proscribing "wandering" and/or "loitering" as too vague to fairly apprise persons of what conduct is prohibited.[6]

(2) *"Found abroad at late or unusual hours in the night without any visible or lawful business."*

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[4]Contrasting *Kelley v. United States*, 111 U.S. App. D.C. 396, 397, 298 F.2d 310, 311 (1961) with *Harris v. District of Columbia*, 132 A.2d 152, 154 (D.C. Mun. App. 1957), rev'd on other grounds 102 U.S. App. D.C. 202, 251 F.2d 913 (1958).

[5]The court summarized the police testimony in *Ricks* as follows:

> "One police officer considered loitering to consist in 'walking back and forth from the corner and standing idle in a doorway'. Another felt that it was 'standing around in one spot, not going anywhere. Just standing there flagging automobiles'. Still another said it was '[s]tanding idle in a doorway'. The Chief of the Law Enforcement Division of the Corporation Counsel's office defined loitering as 'a man hanging around a street corner he has been hanging around for an hour, we will say, there is no apparent purpose or motive for his being there. But, now loitering in and of itself doesn't make me a vagrant. * * * You have got to have some acts on his part to indicate that he has an ulterior motive'." *Ricks v. District of Columbia*, 414 F.2d 1097, 1103, n. 41 (D.C. Cir. 1968).

[6]See, e.g., *Scott v. District Attorney, Jefferson Parish, State of Louisiana*, 309 F. Supp. 833 (E.D. La. 1970); *Landry v. Daley*, 280 F. Supp. 968 (N.D. Ill. 1968); *Arnold v. City and County of Denver*, ___ Colo. ___, 464 P.2d 515 (1970), overruling *Dominguez v. City and County of Denver*, 147 Colo. 233, 363 P.2d 661 (1961); *Headley v. Selkowitz*, 171 So. 2d 368 (Fla. 1965).

This phrase is simply a nocturnal version of "wandering" or "loitering" and is subject to the same vagaries of interpretation that render those verbs insufficient as standards of conduct. Being "abroad . . . without any visible or lawful business" could mean "to ramble here and there, without any certain course or object in view" (as in the dictionary definition of "wander"),[7] in which case the proscription would embrace the law professor who walks the streets midnight.[8] On the other hand the phrase could be construed to prohibit only being abroad for an unlawful or criminal purpose.[9]

The problem is that the statutory language provides no basis for selection among these alternatives. As one district court put it:

> "nor does the phrase 'without lawful business' do more than beg the question of when loitering or loafing [or wandering] can themselves amount to 'lawful business'." *Scott v. District Attorney, Jefferson Parish, State of Louisiana,* 309 F. Supp. 833, 837 (E.D. La. 1970).

(3) *"Does not give satisfactory account of himself"*

Whether this clause be regarded as an element of the offense, or as an opportunity for potential defendants to exculpate themselves,[10] it is so incredibly vague and subjective

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[7]See footnote 3, *supra.*

[8]Reich, *Police Questioning of Law Abiding Citizens,* 75 YALE L. J. 1161 (1966).

[9]*City of Portland v. Goodwin,* 187 Ore. 409, 429, 210 P.2d 577, 586 (1949).

[10]The latter notion is the product of some incredible constructional gymnastics engaged in by some courts in an effort to save statutes containing "satisfactory account" clauses from obvious conflict with the privilege against self-incrimination. See, e.g. *People v. Merolla,* 9 N.Y. 2d 62, 172 N.E. 2d 541 (1961).

as to contaminate virtually any statute or ordinance that includes it.

A virtually infinite number of unanswered questions could be propounded as to the meaning of "satisfactory account". Just a few of them were raised by a three-judge district court in striking down a loitering ordinance which embodied the requirement:

> "We do not believe that the requirement that an offender 'give a satisfactory account of himself' passes constitutional tests. It places sole determination in the discretion of the policeman on the beat. The standard of 'satisfactory account' is not certain, for what may be satisfactory to one may be unsatisfactory to another, and the meaning of the word 'satisfactory' itself is not susceptible of any standard of exactness. What kind of 'satisfactory'? Legal or moral satisfaction? What is the time limit to be embraced within the giving of 'a satisfactory account' that will excuse the offender in the sole discretion of the police officer who demands it? A satisfactory account at that instant or a satisfactory account of past activity? If of past activity, is that not guilt without proof? Does the mere fact that one cannot give a satisfactory account of himself to the pleasure of the inquiring officer make him guilty of an unspecified crime?" *Baker v. Bindner*, 274 F. Supp. 658 (W.D. Ky. 1967).

Equally unanswered is how much of an explanation is needed to add up to an "account", who is entitled to demand an account, whether an account which is incredible but truthful is "satisfactory"; and, conversely, whether a credible but false account "satisfies" the requirement. Considerations such as these have led at least nine lower fede-

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Nevertheless, such a construction cannot operate to save the ordinance from a vagueness attack as even exculpatory clauses are held to the standard of clarity. *Cline v. Frink Dairy Co.*, 274 U.S. 445 (1927).

ral and state courts in the last five years to strike down vagrancy or suspicious persons laws containing a "satisfactory account" or comparable requirement.[11]

(4) *"Suspicious person"*

Nor is this otherwise vague ordinance given any finite content by its characterization of offenders as "suspicious persons". This phrase is little more than an epithet and furnishes no guidance to potential offenders as to what they must do or not do to avoid criminal liability under its appellation.

In sum, while each of the aforementioned ingredients of the Euclid suspicious persons ordinance is sufficiently vague to render it of dubious constitutionality, the hash that results from their combination is so incomprehensible that its invalidity should be beyond question. The ordinance fits Mr. Justice Frankfurter's description of the statute invalidated in *Lanzetta v. New Jersey*, 306 U.S. 451 (1939) as

> "of the type that seek to control 'vagrancy'. These statutes are in a class by themselves in view of the familiar abuses to which they are put . . . Definiteness is designedly avoided so as to allow the net to be cast at large, to enable men to be caught who are vaguely undesirable in the eyes of the police and prosecution, although not chargeable with any

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[11] See *Ricks v. District of Columbia*, 414 F.2d 1097 (D.C. Cir. 1968) ("good account"); *Scott v. District Attorney, Jefferson Parish, State of Louisiana*, 309 F. Supp. 833 (1970) ("account for lawful presence"); *Landry v. Daley*, 280 F. Supp. 968 (N.D. Ill. 1968) ("reasonable excuse"); *Baker v. Bindner*, 274 F. Supp. 658 (3 judge court W.D. Ky. 1967); *United States v. Margeson*, 259 F. Supp. 256 (E.D. Pa. 1966) ("good account"); *Arnold v. City and County of Denver*, ___ Colo. ___, 464 P.2d 515 (1970), overruling *Dominguez v. City and County of Denver*, 147 Colo. 233, 363 P.2d 661 (1961); *Headley v. Selkowitz*, 171 So. 2d 368 (Fla. 1965); *Alegata v. Commonwealth*, 353 Mass. 287, 231 N.E. 2d 201 (1967); *City of Seattle v. Drew*, 70 Wash. 2d 405, 423 P.2d 522 (1967).

particular offense. In short, these 'vagrancy statutes' and laws against 'gangs' are not fenced in by the text of the statutes or by the subject matter so as to give notice of conduct to be avoided." *Winters v. New York*, 333 U.S. 507, 540 (1948) (dissenting opinion).

B. The Vagueness Of The Ordinance Invites Arbitrary And Discriminatory Enforcement.

A second reason for the invalidation of vague penal statutes is that they vest discretion unfettered by statutory standards in law enforcement officials, *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965), and courts and juries, *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966), thereby facilitating arbitrary and discriminatory enforcement and conviction.

No elaborate reasoning is required to demonstrate that the Euclid suspicious persons ordinance suffers from this vice, for not only is it abundant with vagueness, but it also expressly devises unfettered discretion to the police to subjectively determine culpability by any or no criterion, pursuant to the "satisfactory account" requirement. Accordingly the ordinance stands condemned under this Court's decision in *Shuttlesworth v. City of Birmingham, supra*, at 90-91, where it said:

> "Literally read, therefore, the second part of this ordinance says that a person may stand on a public sidewalk in Birmingham only at the whim of any police officer of that city. The constitutional vice of so broad a provision needs no demonstration. It 'does not provide for government by clearly defined laws, but rather for government by the moment-to-moment opinions of a policeman on his beat.' *Cox v. State of Louisiana*, 379 U.S. 536, 559, 579 (separate opinion of MR. JUSTICE BLACK)."

In addition, the vagueness of such phrases as "wander", "abroad", "without any visible or lawful business", and "suspicious person" permit the police to employ illegiti-

mate bases for selecting subjects from whom "satisfactory accounts" are demanded. In the instant case, Euclid police officer Zupanic testified (with commendable candor) that James Palmer became "a suspicious person" in part because "a colored female" alighted from his car (A. 5) when he knew no colored females lived in the apartment complex (A. 7, 20, 21).[12]

While American race relations have undergone enormous changes since 1944, when Gunnar Myrdal reported general and pervasive racial discrimination in law enforcement,[13] there is reason to believe that race is still a significant factor in police street patrol and suspicious person practices. Latest available arrest statistics reveal that Negroes are disproportionately arrested for "suspicion" (arrests for no specific offense and released without formal charges being placed), accounting for 45.3 per cent of such arrests, compared to only 27.5 per cent of total arrests.[14] These gross statistics are corroborated by recent studies of police behavior,[15] and illustrated by anecdotal reports of detentions

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[12] Of possible significance was Zupanic's gratuitous insertion of Palmer's race—"Colored"—on the affidavit line marked "Sex", when the form called for no racial classification. (A. 3).

[13] ". . . Negroes are more likely to be arrested than whites, more likely to be indicted after arrest, more likely to be convicted in court and punished. Negroes will be arrested on the slightest suspicion, or on no suspicion at all, merely to provide witnesses or to work during a labor shortage in violation of anti-peonage laws. The popular belief that all Negroes are inherently criminal operates to increase arrests, and the Negro's lack of political power prevents a white policeman from worrying about how many Negro arrests he makes." Myrdal, *An American Dilemma*, 968 (1st ed. 1944).

[14] F.B.I., *Uniform Crime Reports* - 1968, Table 30, p. 120.

[15] See, e.g. President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Police*, at 184 (1967) reporting a survey based on riding with patrol units in two cities which disclosed that members of minority groups were often stopped, particularly if found in groups, in the company of white

and arrests of responsible, law-abiding Negroes.[16] Indeed, this Court took note of such practices in its decision in *Terry v. Ohio*, 392 U.S. 1, 13 (1968).[17]

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people, or at night in white neighborhoods, and that this caused serious problems in police-community relations; and Tiffany, McIntyre, and Rotenberg, *Detection of Crime*, at 20 (1967):

> "A person of one race observed in an area which is largely inhabited by a different racial group may be stopped and questioned. A Negro in an area which is almost exclusively white is more suspect than a white in the same area, although a decision to stop for questioning may not be made on that basis alone. A white person in a Negro neighborhood late at night is very likely to be detained. But in the latter case the purpose of the detention is not usually to detect crime but to warn the person of the danger of being in the area particularly if he is alone."

[16]See, e.g., Judge Theodore Souris' report of an eminent Negro jurist who was stopped while driving home at night after visiting his fiancee in a fashionable residential neighborhood. At the police officer's request, he handed over his driver's license and automobile registration and informed the officer that he had been visiting a friend in the neighborhood. But he refused to identify his fiancee and was thereupon taken to police headquarters where he was immediately recognized and released with appropriate apologies. Souris, *Stop and Frisk or Arrest and Search—The Use and Misuse of Euphemisms*, 57 J. CRIM. L. C. & P. S. 251, 252-253 (1966).

The facts of this incident bear striking similarity to some of those in the instant case, particularly the judge's refusal to divulge the identity of his female friend (A. 7). Perhaps, if James Palmer were a judge, he would not now be under sentence of thirty days imprisonment.

For testimony that this story is not a unique one, see American Law Institute, *1966 Proceedings*, at 105, where Judge George Edwards, relating his experience as Police Commissioner of Detroit, stated,

> "I don't think I know a single Negro lawyer, businessman, or doctor who has talked to me about this topic who has not told of his [personal] experience with stop and frisk."

[17]The Court concluded that the application of the exclusionary rule to the product of legitimate police investigations would not effectively deter the practices complained of. Of course, the issue in the instant case is not the exclusionary rule, but rather the subject of

It might be contended that race is a neutral, rational and noninvidious basis for determining who is not a resident of the patrolled neighborhood and is therefore the proper subject of investigation. However, this claim must be evaluated in the light of the history of racial discrimination and segregation that facilitates it and of "the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States". *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964).

A majority of this Court has taken the position that racial classifications in the exercise of state police power

> "bear a heavy burden of justification . . . and will be upheld only if necessary, and not merely rationally related to the accomplishment of a permissible state policy." *Id.*, at 194.[18]

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an investigation which discloses no evidence of crime may be imprisoned for having generated suspicion.

[18] Articulating its reasons for imposing this heavy burden of justification, the majority opinion declared,

> "We deal here with a racial classification embodied in a criminal statute. In this context, where the power of the State weighs most heavily upon the individual or the group, we must be especially sensitive to the policies of the Equal Protection Clause which, as reflected in congressional enactments dating from 1870, were intended to secure 'the full and equal benefit of all laws and proceedings for the security of persons and property' and to subject all persons to 'like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.' R.S. § 1977, 42 U.S.C. § 1981 (1958 ed.)."

Two members have stated that

> "it is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor." *McLaughlin v. Florida*, *supra*, at 198. (Separate opinion of MR. JUSTICE STEWART and MR. JUSTICE DOUGLAS).

Although the Euclid suspicious persons ordinance contains no express racial elements, its vagueness facilitates enforcement on a racial basis as surely as if embodied in the language of the ordinance itself.

The contention that race furnishes a neutral basis for inquiry requires a threshold showing that white persons found in black neighborhoods are subject to the same treatment as black persons found in white neighborhoods. The available evidence on this question falls far short of the "heavy burden of justification" required, and in fact may even point to the contrary conclusion.[19]

Secondly, the need to discuss this issue in terms of black neighborhoods and white neighborhoods constitutes a tragic reminder of the long history of housing discrimination and segregation, both governmental[20] and private,[21] that facilitates the use of race as a sign of being out of place. In the instant case, Officer Zupanic could testify that no colored females lived in an apartment complex (A. 7) large enough to have 2,000 cars parked on the premises (A. 12). This is not surprising in the City of Euclid, a municipality for which the census reported only 105 nonwhite residents out

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[19] See Tiffany, et al., *Detection of Crime, supra,* at fn. 15, indicating that detentions of whites in black neighborhoods are generally for the purpose of warning them of the danger of being in the area.

[20] See *Buchanan v. Warley,* 245 U.S. 60 (1917).

[21] See *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409, 441-442 (1968):

> "Just as the Black Codes, enacted after the Civil War to restrict the free exercise of those rights, were substitutes for the slave system, so the exclusion of Negroes from white communities became a substitute for the Black Codes. And when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery."

See also: *Shelley v. Kraemer,* 334 U.S. 1 (1948); and Title VIII (Fair Housing), *Civil Rights Act of 1968,* 82 Stat. 73, 42 U.S.C. § 3601-3619.

of a total population of 62,998.[22] Government should not be permitted to avail itself of the product of this long history of racial discrimination, even for an otherwise legitimate legislative purpose.[23]

Finally, even if applied in an ostensibly neutral and even-handed manner, the racial test for selecting subjects of detention and investigation necessarily produces a differential impact on the freedom of movement of the minority race, as there are necessarily more areas in which its members will be "out of place".[24]

The capacity of the Euclid suspicious persons ordinance for arbitrary enforcement is not limited to racial discrimination, but also includes the potential for suppressing non-criminal but unconventional persons and behavior. Relevant to this concern is the observation of recent students of police behavior that an essential characteristic of the patrol-

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[22]U.S. Bureau of Census, *Census of Pop. 1960*, Vol. I, p. 37-266, Table 72.

That this paucity of nonwhite residents is not a representative distribution of the area's population is demonstrated by the fact that the same census reported 258,597 nonwhite residents in the county (Cuyahoga) out of a total population of 1,647,895. U.S. Bureau of Census, *Census of Pop. 1960*, Final Report P.H.C. (1)-28, Census Tract Cleveland, Ohio, Table p. 1, p. 14.

Housing discrimination is not a phenomenon unknown to the State of Ohio. See *Hunter v. Erickson*, 393 U.S. 385 (1969); and the Ohio Fair Housing Act, Section 4112.02(H), Ohio Rev. Code.

[23]Cf. *Gaston County, North Carolina v. United States*, 395 U.S. 285 (1969).

[24]Professor Amsterdam points out that

> "[t]he right to travel—freedom of movement—has excellent Fourteenth Amendment credentials in light of the concern of the Reconstruction Congresses with the 'pass system' enforced by the Southern States upon the Freedmen after the Civil War". Amsterdam, footnote 1, *supra*, 3 CRIM. L. BULL. 205, at 213, n. 2.

man's personality is a commitment to conventionalism.[25] Equally relevant are police instructional manuals equating "suspicious" with "unusual".[26] While this may be sound advice for investigatory purposes, and may even provide a legitimate basis for a "stop and frisk", *Terry v. Ohio*, 392 U.S. 1 (1968), it is constitutionally outrageous as a basis for conviction and imprisonment.[27] Yet the vagueness of the

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See *Id.*, at 230-231, n. 22 for authorities demonstrating the 39th Congress' concern that post-Civil War Southern vagrancy laws, although facially color blind, were being discriminatorily enforced against the Freedmen.

[25] Whether this be ascribed to an "authoritarian personality" as in Niederhoffer, *Behind the Shield–The Police in Urban Society*, 108 (1967), or to the element of danger producing a perceptual shorthand that equates the unusual with the violent as in Skolnik, *Justice Without Trial*, 44-48 (1965), the result is the same.

[26] See, e.g., Gilston and Podell, *The Practical Patrolman*, 43 (1959):

> "What makes a 'suspicious' person, action or circumstance? In part it's a matter of not 'belonging'; of being unusual. A person in dirty, ragged clothes may be unusual in one neighborhood, but in another he sticks out like a sore thumb";

And Adams, "Field Interrogation", *Police*, March-April, 28 (1963):

> "A. Be suspicious. This is a healthy police attitude, but it should be controlled and not too obvious.
>
> B. Look for the unusual.
>
> 1. Persons who do not 'belong' where they are observed.
>
> 2. Automobiles which do not 'look right'.
>
> 3. Businesses open at odd hours, or not according to routine or custom."

[27] For a cogent distinction between the use of "suspicious person" type criteria as bases for authorizing threshold inquiry and their use as grounds for conviction (as in the instant case) compare *Commonwealth v. Lehan*, 347 Mass. 197, 196 N.W. 2d 840 (1964) with *Alegata v. Commonwealth*, 353 Mass 287, 231 N.E. 2d 201 (1967). See also *City of Cleveland v. Forrest*, 10 Ohio Misc. 98, 100, 223 N.E. 2d 661, 663 (Mun. Ct. 1967).

Euclid suspicious persons ordinance licenses judge or jury to punish defendants for behavior that is unconventional[28] or, as in *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966), "reprehensible".

C. The Vagueness Of The Ordinance Permits Its Application So As To Punish And Deter Constitutionally Protected Conduct.

The Euclid suspicious persons ordinance either flagrantly violates or implicitly threatens the privilege against self-incrimination, the right to travel, freedom from arrest except upon "probable cause", freedom from conviction except upon proof "beyond a reasonable doubt", and the right not to be punished for the status of being "a suspicious person". The sources of these constitutional liberties and the manner in which the Euclid ordinance threatens them will be developed in the succeeding sections of this brief.

II.

THE PROVISION COMPELLING A SUSPECT TO "GIVE A SATISFACTORY ACCOUNT OF HIMSELF" UNDER PAIN OF FINE AND/OR IMPRISONMENT VIOLATES THE PRIVILEGE AGAINST SELF-INCRIMINATION AND INVALIDATES THE EUCLID SUSPICIOUS PERSONS ORDINANCE ON ITS FACE AND AS APPLIED.

Much of the recent controversy over the scope of the Fifth Amendment privilege against self-incrimination has involved the issue of when and where the privilege is applica-

[28] Note the claim by the City of Euclid in its *Brief Opposing Jurisdiction* of the right to regulate "irregular behavior". *Id.*, at 4.

ble. While there is disagreement over whether particular contexts involve sufficient risk of compulsion to trigger the application of the privilege, *Miranda v. Arizona*, 384 U.S. 436 (1966), there is consensus that government may not use compulsion to elicit incriminating admissions, in or out of the courtroom. *Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965). Thus, the contention that the privilege "does not apply to police interrogations" has not been predicated upon formalistic distinctions between courtroom and police station, but upon a recognition that

> "[s]ince police have no legal right to compel answers, there is no legal obligation to which a privilege in the technical sense can apply. That is, it makes no sense to say that one is privileged not to disclose—that one is excused from the legal consequences of contumacy—when there are no legal consequences of contumacy." 8 Wigmore, *Evidence* § 2252, at 329 n. 27 (McNaughton rev. 1961).

Any contention that language in the *Miranda* opinion permits vesting police with authority to compel answers during "general on-the-scene questioning" is foreclosed by this Court's subsequent explanation of that language in *Davis v. Mississippi*, 394 U.S. 721, at 727 n. 6 (1969):

> "The State relies on various statements in our cases which approve general questioning of citizens in the course of investigating a crime. See *Miranda v. Arizona*, 384 U.S. 436, 477-478 (1966); *Culombe v. Connecticut*, 367 U.S. 568, 635 (concurring opinion) (1961). But these statements merely reiterated *the settled principle that while the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to answer.*" (emphasis added).[29]

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[29] See also the separate opinion of MR. JUSTICE WHITE in *Terry v. Ohio*, 392 U.S. 1, at 34 (1968):

> "Of course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes

The privilege against self-incrimination means that government may not "resort to imprisonment" to compel an individual to answer questions that might incriminate him, *Malloy v. Hogan*, 378 U.S. 1, 8 (1964), may not require him to supply information that may tend to incriminate him, *Marchetti v. United States*, 390 U.S. 39 (1968); *Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965); may not penalize the invocation of the privilege, *Spevack v. Klein*, 385 U.S. 511 (1967); *Griffin v. California*, 380 U.S. 609 (1965), and may not use in any criminal prosecution statements made under threat of sanction for refusal to answer. *Garrity v. New Jersey*, 385 U.S. 493 (1967).

That these principles and authorities prohibit a municipality from making it a crime to refuse to answer a policeman's incriminating questions is recognized in the law review literature by friend[30] and foe[31] alike of expanding police investigatory powers.[32] Yet this is exactly what the

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no basis for an arrest, although it may alert the officer to the need for continued observation."

[30] Kuh, *The "Rest of Us" in the "Policing the Police" Controversy*, 57 J. CRIM. L. C. & P. S. 244, 248 (1966); La Fave, *"Street Encounters" and the Constitution: Terry, Sibron, Peters and Beyond*, 67 MICH. L. REV. 39, 106-107 (1968); Pilcher, *The Law and Practice of Field Interrogation*, 58 J. CRIM. L. C. & P. S. 465, 474 (1967).

See also Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 320 (1942).

[31] Amsterdam, footnote 1, *supra*, 3 CRIM. L. BULL. 205, 228 (1967); Schwartz, *Stop and Frisk (A Case Study in Judicial Control of the Police*, 58 J. CRIM. L. C. & P. S. 433, 459 (1967); Note, *Constitutional Attacks on Vagrancy Laws*, 20 STAN. L. REV. 782, 788-790 (1968).

[32] A similar conclusion has been reached by the American Law Institute. A.L.I., *Model Code of Pre-Arraignment Procedure*, Tent. Drft. No. 2, §§ 2.01(2), 2.02(5).

City of Euclid has done in enacting a suspicious persons ordinance compelling suspects to "give a satisfactory account" of themselves under pain of fine and/or imprisonment for failure to do so.

The "satisfactory account" requirement necessarily puts suspects of whom it is demanded to a choice between the "rock" of prosecution for being a suspicious person and the "whirlpool" of potential self-incrimination. Such a requirement is no mere technical or peripheral violation of the Fifth Amendment, but strikes at the heart of

> "the whole complex of values that the privilege against self-incrimination itself represents, values described in the *Malloy* case as reflecting 'recognition that the American system of criminal prosecution is accusatorial, not inquisitorial, and that the Fifth Amendment privilege is its essential mainstay. * * * Governments, state and federal, are thus constitutionally compelled to establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against an accused out of his own mouth." *Tehan v. Shott*, 382 U.S. 406, 414 (1966).

The privilege against self-incrimination was molded in the cauldron of the Star Chamber where suspects were compelled to respond to incriminating inquiries and to bear the burden of proving their innocence. The abolition of the Star Chamber[33] in the wake of Lilburn's Trial[34] is generally

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This represents an interesting change of position by the Institute since 1961 when it approved the Suspicious Loitering section of the *Model Penal Code* (§ 250.6) requiring suspects to explain their presence and conduct, despite the fact that the Code's Reporter stated, "We are creating a criminal liability by a man refusing to speak. This is an incursion on the privilege of self incrimination." ALI, 1961 Proceedings 249.

No explanation is given in the notes or commentary to the *Model Code of Pre Arraignment Procedure* for this apparent contradiction.

[33] Stat. 16 Charles 1 C. 10 (1641).

[34] 3 How. St. Tr. 1315 (1637-45).

regarded as the foundation of the privilege and the core of its interpretation.[35]

The central meaning of the privilege against self-incrimination requires that Section 583.01(e) of the Ordinances of the City of Euclid be declared unconstitutional on its face for the following reasons: (1) In creating a scheme which gives police the power to summon citizens upon mere suspicion and "demand that they cough up something to dispel [that] suspicision",[36] the essence of the ordinance is a reincarnation of the evil the privilege was designed to eliminate. (2) By definition the law compels a "satisfactory account" only from those "inherently suspect of criminal activities".[37] (3) A declaration of facial unconstitutionality is the only way that the privilege can be vouchsafed from the threat posed by such laws, in light of the fact that the ignoble socio-economic status of most of their victims and their relatively minor penalties effectively foreclose appellate scrutiny[38] of their operation on a case by case basis.[39]

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[35] 8 Wigmore, *Evidence* § 2250 (McNaughton rev. 1961).

[36] Amsterdam, footnote 1, *supra*, 3 CRIM. L. BULL. 205, 228 (1967).

[37] *Albertson v. Subversive Activities Control Board*, 382 U.S. 70, 79 (1965).

[38] President's Commission on Law Enforcement, *Task Force Report: The Courts* 103 (1967).

Other factors that tend to make appeals of such convictions a rarity are the frequent absence of a written record and mootness by service of sentence.

For a description of the kind of "due process" that is administered under circumstances where appellate review is not a realistic recourse, see Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603, *passim* (1956). To summarize Professor Foote's field study in his own words: "Procedural due process does not penetrate to the world inhabited by the 'bums' of Philadelphia." Id., at 604.

[39] As to the possibility of other remedies, such as affirmative suits for damages, to vindicate the privilege, note Euclid Police Lieutenant Zach's testimony about "waiver cards":

As applied in the instant case, the ordinance produced a conviction which cannot stand, for much of the case against Palmer consisted of statements elicited from him under the compulsion of the requirement that he give "a satisfactory account".[40] (A. 6-7, 22-23). The admission into evidence of statements so obtained is prohibited by the Fifth and Fourteenth Amendments. *Garrity v. New Jersey*, 385 U.S. 493 (1967).

After testifying that if he had found Palmer's companion in an apartment on lawful business, he wouldn't have permitted the citation, he said (in response to Palmer's questioning),

"A. We would have brought you into the station and had you sign a waiver card that we detained you?

Q. What is this waiver card? If I would refuse to sign the waiver card, then what would have happened to me?

A. Well, then, we would have detained you, probably issued the citation, because you refused to sign the card.

Q. You would have issued a citation for my arrest even though you found this lady lawfully at the building; is that what you're saying?

A. That is right. If you refused to sign the card. (A. 24)."

[40]The existence of the "satisfactory account" requirement in the ordinance obviates the necessity of deciding the otherwise important, but in this context irrelevant, question of whether the requirement of *Miranda* warnings applies to street detentions, i.e. whether the officer's removal of Palmer from his car and search of him (A. 7), marching of Palmer into the apartment house at gun-point (A. 8, 12-13), or holder for investigation at the station (A. 6-7) constituted deprivations of "his freedom of action in any significant way." *Miranda v. Arizona*, 384 U.S. 436,444 (1966).

With the ordinance on the books, the officer could not have advised Palmer that he had a right to remain silent. He would have had to say, "If you [do] say anything, it will be used against you; if you do not say anything, that will be used against you." *McCarthy v. United States*, 25 F.2d 298, 299 (6th Cir. 1928).

III.

THE EUCLID SUSPICIOUS PERSONS ORDINANCE UNCONSTITUTIONALLY INFRINGES FREEDOM OF MOVEMENT BY ALLOWING ARREST, DETENTION, AND CONVICTION ON SUSPICION IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS.

"Freedom of movement is basic in our scheme of values" and may not be deprived without due process of law. *Kent v. Dulles*, 357 U.S. 116, 126 (1958).[41] As the Court noted:

> "'Our nation has thrived on the principle that, outside areas of plainly harmful conduct, every American is left to shape his own life as he thinks best, do what he pleases, go where he pleases.'" *Id.*, quoting Chafee, *Three Human Rights in the Constitution of 1787*, 197 (1956).

Of course this freedom is not absolute and must be reconciled with the interest of maintaining order. The task of accommodating the often opposing interests in liberty and order was undertaken by the framers of the Constitution and Bill of Rights. The resultant delicate balance is reflected in an escalating scale of constitutional burdens of proof (emanating from the Fourth and Fourteenth Amendments) required of government before it may deprive persons of their liberty in the interest of order.

The quantum of evidence required by each of these constitutional burdens of proof is directly related to the magnitude of the deprivation of liberty to be justified. Thus a brief, temporary intrusion on the liberty of a citizen by a police officer in the course of a "street encounter" requires that the officer

> "be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

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[41] Regarding the concern of the framers of the Fourteenth Amendment for the right of the freedman "to go where he pleases" see *Bell v. Maryland*, 378 U.S. 226, 293 (1964); and footnote 24, *supra*.

The more serious deprivation of liberty represented by an arrest demands that the arresting officer have "probable cause", defined as

> "facts and circumstances within [his] knowledge and of which [he] had reasonably trustworthy information . . . sufficient to warrant a prudent man in believing that the [arrestee] had committed or was committing an offense." *Beck v. Ohio*, 379 U.S. 89, 91 (1964).

The ultimate deprivation of liberty that ensues from the conviction of an accused may not be levied

> "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, ___ U.S. ___, 90 S. Ct. 1068 (1970).

It has been abundantly demonstrated that suspicious person and vagrancy type laws are calculated to circumvent these constitutional standards and facilitate detention, arrest, search, interrogation and conviction of suspected criminals with respect to whom the authorities do not have the requisite quantum of evidence.[42] By making the generation of suspicion itself the substantive offense, such "laws" make hash out of the delicate balance which the Constitution seeks to establish between the societal interests in liberty and order.

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[42] President's Commission . . ., *Task Force Report: The Courts* 103 (1967); Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L. J. 1 (1960); Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603, 628-630 (1956); La Fave, *Penal Code Revision: Considering the Problems and Practices of the Police*, 45 TEXAS L. REV. 434, 451-452 (1967).

An interesting illustration of this phenomenon was *People v. Craig*, 152 Cal. 42, 91 P. 997 (1907) where a police officer who lacked statutory grounds to arrest for an assault said; "Well the only thing we can do—we didn't see it—we will go and vag them."

Thus, on facts which should justify at most a "stop and frisk" of James Palmer,[43] the City of Euclid now seeks to uphold a conviction and sentence of imprisonment. While the advocates of allowing police to "stop and frisk" upon less than "probable cause" have relied on the argument that a lesser intrusion requires a lesser quantum of evidence,[44] if this ordinance is upheld then "stop and frisk" facts will henceforth be the basis for arrest and conviction. The operative standards of justification will be reduced to "'articulable suspicion' to suspect" for a stop and frisk, "'probable cause' to suspect" for an arrest, and "proof of suspicion 'beyond a reasonable doubt'" to convict.

The salt in these grievous constitutional wounds will be that, by operation of the "satisfactory account" requirement, the effective burden of proof will be on the defendant.

IV.

THERE IS NO NECESSITY FOR THE EUCLID SUSPICIOUS PERSONS ORDINANCE, AND TO THE EXTENT THAT IT SERVES LEGITIMATE PURPOSES, OTHER MEANS LESS DESTRUCTIVE OF PERSONAL LIBERTY, ARE AVAILABLE.

One well-established principle by which this Court tests the constitutionality of statutes affecting sensitive areas of liberty is that

> "[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental per-

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[43] Because the question in this case is whether or not Palmer's conviction for "being a suspicious" person may stand, it is unnecessary to decide whether "being a suspicious person" justified the lesser intrusion of the "stop and frisk" (A. 7) under *Terry*, or the "arrest" (A. 7-8) under *Beck v. Ohio*, *supra*, and *Peters v. New York*, 392 U.S. 40 (1968).

[44] *Terry v. Ohio*, 392 U.S. 1, 10-11 (1968).

> sonal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose." *Aptheker v. Secretary of State*, 378 U.S. 500, 508 (1964), quoting from *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

If there ever was a necessity for suspicious persons ordinances (i.e. that the Fourth Amendment talismans of "arrest", "search" and "seizure" did not allow for the "set of flexible responses" required of police in the context of street encounters) that necessity has been dissipated by this Court's decision in *Terry v. Ohio*, 392 U.S. 1 (1968). Without prescribing the details,[45] the Court has held that the Fourth Amendment is not oblivious to the "reasonable" investigatory and protective needs of police.

In the wake of *Terry*, there are a number of feasible alternatives to the Euclid suspicious persons ordinance for effectuating police authority to prevent crime and investigate suspicious circumstances and persons. Without, in any way, approving of them as passing constitutional muster, appellant submits these alternatives for the Court's consideration, because they are, at least, less destructive of important federal constitutional rights than the Euclid ordinance. These alternatives are:

> *The Uniform Arrest Act*, see Warner, 28 VA. L. REV. 315 (1942)
>
> *The New York "Stop and Frisk" Law*, N.Y. Code Crim. Proc. § 180-a
>
> *The Model Code of Pre-Arraignment Procedure*, Article 2 (T.D. No. 2), American Law Institute.
>
> Common law authority recognized by the Cuyahoga County Court of Appeals in *State v. Terry*, 5 Ohio App. 2d 122, 214 N.E. 2d 114 (1966).

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[45] For a thorough exposition of the issues raised by *Terry* see La Fave, *"Street Encounters" and the Constitution: Terry, Sibron, Peters and Beyond*, 67 MICH. L. REV. 39 (1968).

Additionally, the *Model Penal Code's* Article 5 approach to inchoate offenses furnishes a vehicle for crime prevention by drawing the line between attempt and non-criminal preparation further away from the final act.

The common features of all of these alternatives are that they do not permit arrests or convictions on mere suspicion, they do not make it a crime to exercise the privilege against self-incrimination, and they do not shift the burden of proof to the defendant, while still affording ample police authority.

All sides of the crime control versus individual liberty debate, from Professor Foote in 1956[46] to the President's Commission on Law Enforcement and Administration of Justice in 1967[47] to Professor La Fave in 1968[48] have urged that the subterfuges of vague suspicious person and vagrancy laws be abandoned in favor of a direct resolution of the question of police power to deal with persons encountered in suspicious circumstances.

The existence of equally feasible less drastic alternatives means that this Court can make a significant contribution to constitutional liberty at no cost to law enforcement by striking down the Euclid suspicious persons ordinance.

CONCLUSION

The ultimate issue in this case is not the scope of police investigative power, but rather, whether after the police have stopped, frisked, searched, arrested and interrogated James Palmer and discovered no evidence of any substantive crime having been committed, the City of Euclid can then convict and imprison him for having aroused suspicion.

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[46] *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603, 649.

[47] *Task Force Report:* The Courts 103 (1967).

[48] Footnote 45, *supra*, at 124.

The cry of Star Chamber, like the cry of "wolf", has probably been uttered too often and too lightly in the past to have the impact that it should. However, this case and the City of Euclid's suspicious persons ordinance contain, albeit in microcosm, every threat to human liberty posed by that bitter experience. On mere suspicion James Palmer and all other victims of such ordinances are deprived of their liberty, compelled to answer incriminating questions to the satisfaction of officialdom under pain of imprisonment, and required to bear the burden of proving their own innocence of vague suspicion. The Fourth and Fifth Amendments were calculated to prevent just such occurrence and they "run almost into each other"[49] to protect "the right most valued by civilized men" – "the right to be let alone".[50]

These threats to fundamental liberty in the ordinance are made more pernicious by reason of the vagueness which facilitates its discriminatory application in aid of racial separatism. The Fourteenth Amendment was calculated to prevent that.

The Euclid suspicious persons ordinance contains the seeds of destruction of hallowed liberties that respresent the product of 194 years of struggle for human dignity. It must be nullified.

WHEREFORE, it is respectfully urged that the judgment below be reversed.

NIKI Z. SCHWARTZ
JOSHUA J. KANCELBAUM
Counsel for Appellant

August 5, 1970

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[49] *Boyd v. United States*, 116 U.S. 616, 630 (1886).

[50] *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Dissenting opinion of MR. JUSTICE BRANDEIS).

October TERM 1970

NO. 143
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In the Supreme Court of the United States

OCTOBER TERM, 1970.

No. 143.

JAMES PALMER,
Appellant,

v.

CITY OF EUCLID, OHIO,
Appellee.

APPEAL FROM THE SUPREME COURT OF OHIO.

BRIEF OF APPELLEE.

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APPEAL FROM THE SUPREME COURT OF OHIO.

BRIEF OF APPELLEE.

OPINIONS BELOW.

No opinions were delivered by any of the courts below.

JURISDICTION.

The judgment of the Supreme Court of Ohio was entered on December 18, 1968. A petition for re-hearing was denied on January 22, 1969. The appeal was filed in this Court on April 22, 1969, and probable jurisdiction was noted on May 4, 1970. The jurisdiction of this Court rests on 28 U.S.C. § 1257(2).

QUESTIONS PRESENTED.

I.

Whether an ordinance providing for imprisonment of suspicious persons, defined as "Any person who wanders about the streets or other public ways or who is found abroad at late or unusual hours in the night without any visible or lawful business and who does not give satisfactory account of himself;" is so vague and lacking in ascertainable standards of guilt as to fail to give fair notice of what is prohibited, invite arbitrary and discriminatory enforcement, and sweep within its ambit constitutionally protected conduct, so as to be void as in conflict with the Fourteenth Amendment's guarantee of the due process of law?

II.

Whether, consistent with the Fifth Amendment's privilege against self-incrimination, an ordinance may compel a suspect to "give a satisfactory account of himself" under pain of fine and/or imprisonment for failure or refusal to do so?

III.

Whether the Euclid suspicious persons ordinance unconstitutionally infringes freedom of movement by allowing arrest, detention, and conviction on suspicion in violation of the Fourth and Fourteenth Amendments?

STATEMENT.

The facts as set forth in the section entitled "Statement" in Appellant's brief are essentially true. Therefore, the Appellee will not belabor the Court by further recital thereof.

ARGUMENT.

I.

The Euclid suspicious persons ordinance is not so vague and lacking in ascertainable standards of guilt that it failed to give fair notice of what is prohibited, invited arbitrary and discriminatory enforcement and swept within its ambit constitutionally protected conduct, so as to violate the guarantee of due process of law of the Defendant, James Palmer. In this case, the Defendant chose to represent himself. At the time when he was permitted to make his opening argument, he informed the Court that he contended that the arrest was illegal. At no point in his statement to the Court did he assert his reasons for this contention.

With respect to the question of the weight and sufficiency of the evidence, the Court correctly allowed this issue to go to the jury. The jury, by rendering a finding of guilty, determined that the facts were such as to justify the arrest of the Defendant.

The case of *Beck v. Ohio,* 379 U.S. 89, 13 L. Ed. 2d. 142, 85 S. Ct. 223, clearly states that:

> "* * * when the constitutional validity of an arrest is challenged, it is the function of the Court to determine whether the facts available to the officers at the moment of the arrest would warrant a man of reasonable caution in the belief that an offense has been committed."

The record sets forth the facts on which Patrolman Zupanic based his arrest. The vehicle driven by the Defendant was travelling at the rate of 3 to 5 miles per hour in the driveway of an apartment building at about 2:30 o'clock A.M. This vehicle had no headlights. It discharged a colored female passenger at the entrance to one of the buildings.

The vehicle was then driven to East 193rd Street where it was parked. The driver was then seen operating a two-way radio. Upon questioning by the police officer, the Defendant would give no explanation concerning his female companion. He was evasive about his address and refused to give the officer any explanation for his conduct. Furthermore, the officer testified that he knew, as a fact, that no colored females lived in the apartments on the date in question. Assuming, for the purpose of this argument, that the ordinance in question, Section 583.01, Subsection (e) of the Codified Ordinances of the City of Euclid, is constitutional (this shall be discussed later), there was certainly a quantum of facts which would warrant a man of "reasonable caution" to assume that a violation of the ordinance was occurring. The ordinance reads as follows:

> "583.01 *Suspicious Persons*
>
> It shall be unlawful for any suspicious person to be within the municipality. The following shall be deemed suspicious persons:
>
> (e) Any person who wanders about the streets or other public ways or who is found abroad at late or unusual hours in the night without any visible or lawful business and who does not give a satisfactory account of himself."

The Defendant was conducting himself in such a way that the totality of facts constituting his conduct were such as to arouse suspicion and he contributed nothing to dispel this suspicion by his evasive and non-conformative answers.

We now come to what is probably the only truly significant issue raised by the Defendant in his entire lengthy brief. Here, the Defendant argues that Codified Ordinance Section 583.01(e) is unconstitutional.

This issue has been decided by the Honorable Judge Williams of the Cleveland Municipal Court in *City of Cleveland v. Forrest,* 10 Ohio Misc. 98, 223 N.E.2d 661. This writer has the deepest respect for Judge Williams. It is suggested, however, that the facts in the *Forrest* case were so overwhelmingly indicative of a flagrant and gross abuse of the Defendant's rights that the Court, in its distress over the facts, lost sight of the issues and declared an ordinance almost identical with the Euclid ordinance in question unconstitutional in complete disregard for the law in Ohio.

It is axiomatic that poor facts make poor law. The *Forrest* case proves that point. Here, a woman entered a bus after conversing with someone who approached her in an automobile at a bus stop. The police followed the bus for some distance and then entered the vehicle, removed the Defendant forcibly and took her to the police station where she was charged violating the "suspicious persons" ordinance. This case could have been easily disposed of on the question of probable cause and the Court could have, as it should have, avoided the error of declaring the ordinance unconstitutional.

In deciding the *Forrest* case, the Court relied heavily upon *Columbus v. DeLong,* 173 Ohio State 81, 180 N.E.2d 158. This case dealt with a prostitute who was charged with "wandering" about the streets. Here the Court said that a prostitute cannot be "wandering" because she is moving about with the object of plying her trade.

Chief Justice Weygandt, in a vigorous dissent, indicated that the majority had engaged in hair-splitting, and that the true test of the constitutionality of the ordinance was set forth in *Morgan v. Nolte,* 37 Ohio State 23, where the Court held:

"1. The only limitations to the creation of offenses * * * are the guarantees contained in the Bill of Rights.

2. These guarantees are not infringed by Section 2108 of the Revised Statutes which authorizes cities and villages to provide for the punishment of known thieves, pickpockets, watch stuffers, etc.

3. An ordinance under this statute, providing for the punishment of any known thief found in the municipality is valid."

In *Welch v. Cleveland,* 97 Ohio State 311, 120 N.E. 206 and in *Youngstown v. Aiello,* 156 Ohio State 32, 100 N.E.2d 62, the decision in the *Welch* case was approved and followed. In the fifth paragraph of the syllabus in the *Aiello* case, the Court said:

"5. The offense of being a suspicious person does not consist of particular acts, but a mode of life, the habits and practices of the accused in respect to the character or traits which it is the object of the ordinance creating the offense to suppress."

It is obvious that the sole purpose of Section (e) of Euclid ordinance 583.01 is to prevent persons from being abroad at late hours without visible or lawful business in order to protect the businesses and residences of the community from being subjected to burglary and larceny.

Here the facts are certainly indicative of the mode of life, the habits and practices of those who engage in such conduct and the Defendant was, therefore, properly arrested.

The Court's attention is also directed to the decision of the Franklin County Court of Appeals in *City of Columbus v. McCrory,* 49 N.E.2d 583. The Court held in the first syllabus:

"The ordinance of the City of Columbus relating to suspicious persons and providing that any person wandering about the streets without being able to give a reasonable and satisfactory account of himself shall be deemed to be a suspicious person is not violative of due process of law."

II.

Comment must be made about the significance of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, as it applies to the ordinance in question. We must keep in mind that *Miranda* refers to custodial interrogation. The thrust of *Miranda* is that the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the Defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination; "custodial interrogation" is questioning initiated by the law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.

Here, we must draw the distinction between investigatory and accusatory situations. The questions asked of the Defendant were investigatory in nature and were asked prior to his being taken to the police station. At this point, the Defendant was advised of his rights and he chose to continue answering questions which were merely cumulative in nature since the crime was actually committed and the investigation made at the scene prior to the actual arrest.

There is nothing in the *Miranda* decision which prevents an officer from making an investigation when the facts are sufficient to indicate probable cause. In the course of this investigation, before taking the subject into

custody, he may ask for a reasonable explanation of certain conduct which gives rise to the suspicion.

III.

The Supreme Court of the United States in *Terry v. Ohio*, 392 U.S. 1 (1968) upheld the right of a police officer to question and search a person under similar circumstances confronted by Patrolman Zupanic of the City of Euclid Police Department in the case before this Court.

Government has the right to pass laws which will protect its citizens from the persons who are threats to its well-being. There is nothing violative of the Fourth Amendment in an ordinance which makes it a misdemeanor for an individual to refuse to give a reasonable explanation to a police officer who has observed a course of conduct which would arouse the suspicions of a reasonably prudent person as to the activities of a person who is found abroad at late or unusual hours where it appears that he has no lawful business.

To declare this ordinance unconstitutional would do violence to the whole theory of preventive law enforcement. The true test is not the language of the ordinance, but the question of "probable cause." This is where the constitutional safeguarding exists. In the instant case, the facts scream out "probable cause" and the conviction, therefore, should be sustained by this Court refusing to accept jurisdiction of the within matter.

Respectfully submitted,

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October 30, 1970.

PALMER *v.* CITY OF EUCLID, OHIO

ON APPEAL FROM THE SUPREME COURT OF OHIO

No. 143. Argued January 11, 1971—Decided May 24, 1971

Appellant, who had been seen to drive his car late at night from a parking lot and discharge a female at an apartment house, park on the street, and use a two-way radio, and who thereafter gave the police multiple addresses and denied knowledge of his friend's identity, was convicted of violating the Euclid, Ohio, "suspicious person ordinance," which makes it a crime to (1) wander about the streets or be abroad at late or unusual hours; (2) be at the time without visible or lawful business; and (3) fail satisfactorily to explain one's presence on the streets. His conviction was upheld on appeal. *Held:* The ordinance is unconstitutionally vague as applied to appellant since it gave insufficient notice that appellant's conduct in the parked car or in discharging his passenger was enough to show him to be "without visible or lawful business."

Reversed.

Niki Z. Schwartz argued the cause for appellant. With him on the brief was *Joshua J. Kancelbaum.*

David J. Lombardo argued the cause for appellee. With him on the brief was *William T. Monroe.*

PER CURIAM.

Appellant Palmer was convicted by a jury of violating the City of Euclid's "suspicious person ordinance," that is, of being

> "[a]ny person who wanders about the streets or other public ways or who is found abroad at late or unusual hours in the night without any visible or lawful business and who does not give satisfactory account of himself."

He was fined $50 and sentenced to 30 days in jail. The County Court of Appeals affirmed the judgment and appeal to the Supreme Court of Ohio was dismissed "for

the reason that no substantial constitutional question exists herein." We noted probable jurisdiction. 397 U. S. 1073 (1970).

We reverse the judgment against Palmer because the ordinance is so vague and lacking in ascertainable standards of guilt that, as applied to Palmer, it failed to give "a person of ordinary intelligence fair notice that his contemplated conduct is forbidden . . . ." *United States* v. *Harriss*, 347 U. S. 612, 617 (1954).

The elements of the crime defined by the ordinance apparently are (1) wandering about the streets or being abroad at late or unusual hours; (2) being at the time without visible or lawful business;* and (3) failing to give a satisfactory explanation for his presence on the streets. Palmer, in his car, was seen late at night in a parking lot. A female left his car and entered by the front door an adjoining apartment house. Palmer then pulled onto the street, parked with his lights on, and used a two-way radio. He was not armed. He said he had just let off a friend. He was then arrested. At the station he gave three different addresses for himself and said he did not know his friend's name or where she was going when she left his car. Palmer could reasonably be charged with knowing that he was on the streets at a late or unusual hour and that denying knowledge of his friend's identity and claiming multiple addresses amounted to an unsatisfactory explanation under the ordinance. But in our view the ordinance gave insufficient notice to the average person that discharging

*The ordinance seemingly requires a "business" purpose to be on the streets. But it seems irrational to construe the ordinance as permitting only visible and lawful commercial activities on the streets, thus in effect converting the ordinance into a curfew with exceptions for lawful commercial conduct. Neither the lower court nor appellee city suggests that the ordinance should be construed in this manner or that anyone would expect that it would be so construed.

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a friend at an apartment house and then talking on a car radio while parked on the street was enough to show him to be "without any visible or lawful business." Insofar as this record reveals, everything appellant did was quite visible and there is no suggestion whatsoever that what he did was unlawful under the local, state, or federal law. If his conduct nevertheless satisfied the being-without-visible-or-lawful-business element of the ordinance, as the state courts must have held, it is quite unreasonable in our view to charge him with notice that such would be the construction of the ordinance. "The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *United States* v. *Harriss, supra,* at 617; *Bouie* v. *Columbia,* 378 U. S. 347 (1964); *Wright* v. *Georgia,* 373 U. S. 284 (1963).

The judgment of the Supreme Court of Ohio is reversed.

It is so ordered.

MR. JUSTICE HARLAN concurs in the result.

MR. JUSTICE STEWART, with whom MR. JUSTICE DOUGLAS joins, concurring.

While I agree with the Court that Euclid's "suspicious person ordinance" is unconstitutional as applied to the appellant, I would go further and hold that the ordinance is unconstitutionally vague on its face.

A policeman has a duty to investigate suspicious circumstances, and the circumstance of a person wandering the streets late at night without apparent lawful business may often present the occasion for police inquiry. But in my view government does not have constitutional power to make that circumstance, without more, a criminal offense.